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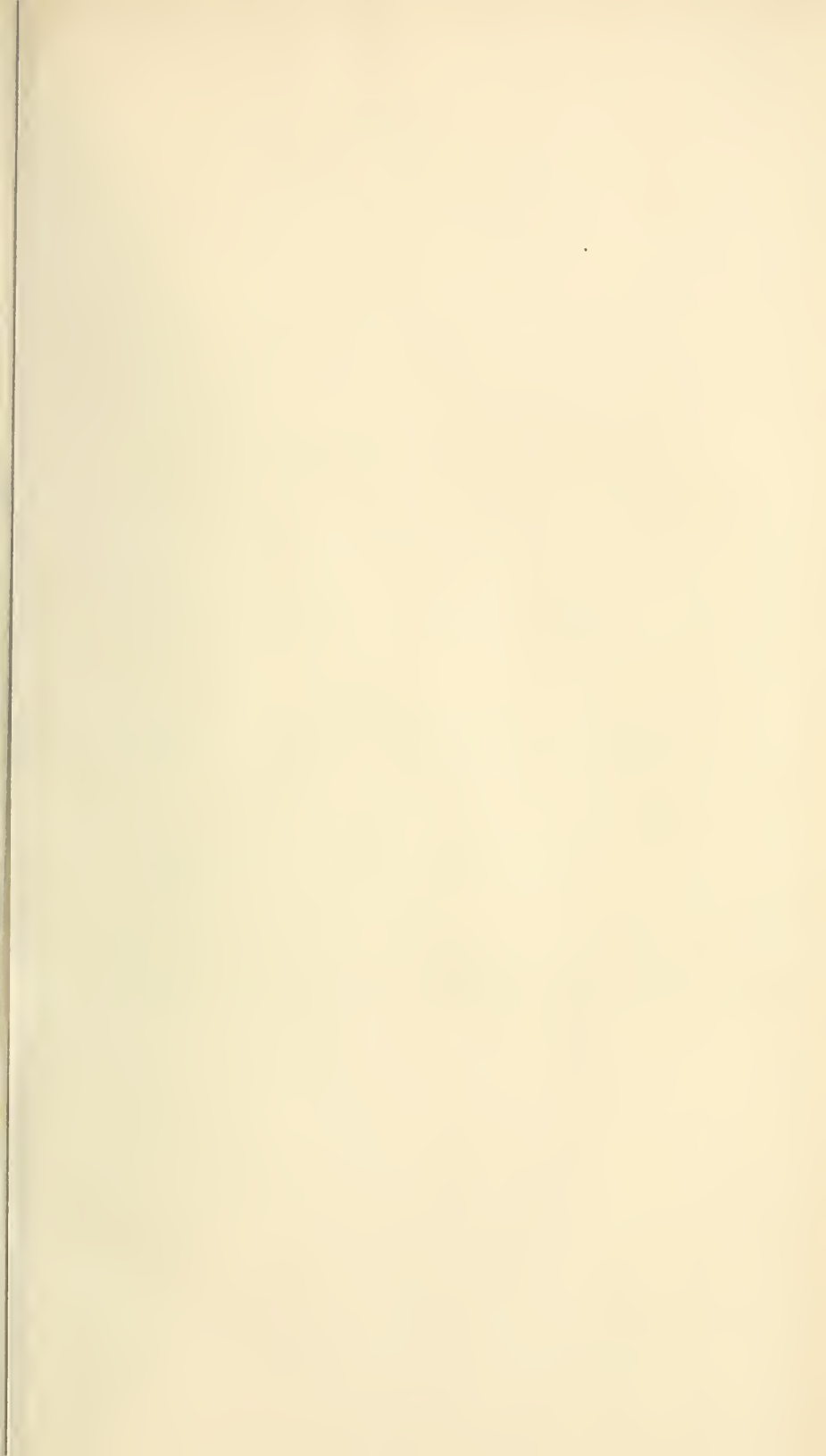
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THE
LAW
OF
REAL PROPERTY,
IN
ITS PRESENT STATE;

PRACTICALLY ARRANGED AND DIGESTED

IN ALL ITS BRANCHES,

INCLUDING

THE VERY LATEST DECISIONS OF THE COURTS.

BY

GEORGE CRABB, Esq.,

BARRISTER-AT-LAW.

WITH NOTES AND REFERENCES TO AMERICAN DECISIONS BY
A MEMBER OF THE PHILADELPHIA BAR.

VOL. I.

PHILADELPHIA:

T. & J. W. JOHNSON,

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P R E F A C E.

THIS Work, which has employed the Author's leisure time for upwards of ten years, is distinguished from every other in several particulars.

In the first place, it is confined to the Law in its Present State. Whatever is mere matter of history has been excluded; and that which has been abolished by statute, but remains in force in respect of past transactions, has been briefly touched upon.

In the next place, it is confined to the Law as settled by the Decisions of the Courts, so far as any thing in law can be considered as settled. That which is confessedly not settled has been noticed, so as to show the state of the Law, without entering into discussions on doubtful points, which may be found treated of at large in other treatises.

By thus confining the Work to what is wanted in ordinary practice, the Author has been enabled, without swelling it to an immoderate size, to embrace the whole of the Law of Real Property, of which particular parts only are considered in other works.

As, in a Treatise professing to give a connected view of a subject, arrangement is obviously an essential ingredient, this Work is on that score also (whether for the better or the worse) distinguishable from others. Except as regards the general outlines, in which the plan of Sir Matthew Hale (afterwards adopted by Sir William Blackstone) has been partially followed, the endeavour has been to make all the matter follow in such order as shall serve to give a clear and distinct view of the several points, and their consequent bearings on the subject in question.

The Statutes on the Transfer of Property, though passed late in the Session, have been noticed in their proper places, as also the latest Decisions, including those of the present year until the closing of the Courts.

What relates to the subject of Conveyancing, and to the Statutory Provisions concerning Real Property, is noticed by a reference to the Author's "Precedents in Conveyancing," and "Digest and Index of all the Statutes."



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York (D.) v. Eaton, Trusts	1783	Year to Year	1594
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L A W
OF
R E A L P R O P E R T Y.

INTRODUCTION.

§ 1. ALL property is distinguished into Real and Personal. Real property comprehends things that are immovable, and personal property things which are movable and go with the person.

The law of real property may be considered under these five general heads or books, namely :

BOOK I. NATURE OF REAL PROPERTY IN GENERAL.

BOOK II. THE TENURES BY WHICH THINGS REAL MAY BE HELD.

BOOK III. THE ESTATES WHICH MAY BE HAD IN THINGS REAL.

BOOK IV. THE TITLE TO THINGS REAL.

BOOK V. INJURIES TO THINGS REAL AND THEIR REMEDIES.

The book on Tenures relates to Corporeal Hereditaments only, the other book relate as well to Incorporeal as Corporeal Hereditaments.

BOOK I.

NATURE OF REAL PROPERTY IN GENERAL.

[*2]

*CHAP. I.

DISTINCTION BETWEEN REALTY AND PERSONALTY.

CHAP. II.

CORPOREAL HEREDITAMENTS.

CHAP. III.

INCORPOREAL HEREDITAMENTS.

§ 2. ALL real property is comprehended under the words "Lands, tenements, and hereditaments:" *lands*, as the subject-matter on which the Law of Real Property is founded: *tenements*, as that which is held; and *hereditaments*, as that which is inherited.

The word "*lands*" in its most universal acceptation is of very extensive import; it legally includes not only castles and houses which rest upon it as their foundation, but also all things belonging to or connected with it, as well upwards as downwards, as mines, water, air, and all other things even up to heaven, according to the maxim *cujus est solum ejus est usque ad cælum*.(a)

The word "*tenements*" taken in its most comprehensive sense is of still wider import, comprehending whatever may be holden, provided it be of a permanent nature, whether of the substantial or ideal kind, including there-
[*3] fore *"not only all corporate inheritances which are or may be holden, but also all inheritances issuing out of any of those inheritances, or concerning, or annexed to or exercisable within the same;"(b) as rents, estovers, commons or other profits whatsoever granted out of land; or uses, offices, or dignities which concern land, wherein a man hath any frank-tenement or freehold, and whereof he is seised *ut de libero tenemento*.(b) *Tenement*, which is the only word used in the Statute *de Donis*, is in its ordinary, but limited acceptation, applied to houses and buildings.

"*Hereditaments*" is a word of still larger extent than either of the two preceding, including not only lands and tenements, but whatever may be inherited, be it real, personal, or mixed, that is neither land nor tenement, but a mere movable as a piece of furniture, and the like. *Hereditaments* are distinguished into corporeal and incorporeal. *Corporeal hereditaments* are such as affect the senses, as lands, and houses, &c.; *incorporeal*

(a) Plowd. 313; 1 Inst. 4, a; 2 Comm. 17.

(b) 1 Inst. 19, b.

hereditaments such as are not the objects of sense, but exist in the mind only.

The nature of Real Property may be further considered under these three heads or chapters : 1. Distinction between Realty and Personality. 2. Corporeal Hereditaments. 3. Incorporeal Hereditaments.

*CHAPTER I. [*4]

DISTINCTION BETWEEN REALTY AND PERSONALTY.

SECT. I.

§ 4. THE DEVOLUTION OF REALTY AND PERSONALTY.

SECT. II.

§ 30. LIABILITY TO THE PAYMENT OF DEBTS.

SECT. III.

§ 60. RECIPROCAL CONVERSION OF REALTY AND PERSONALTY.

SECT. IV.

§ 79. MISCELLANEOUS MATTERS RELATING TO REALTY AND PERSONALTY.

§ 3. Real property is distinguished from personality in different ways : 1. As to the manner of its devolving ; 2. As to its liability to the debts of the owner ; 3. As to the reciprocal conversion of one into the other ; 4. Miscellaneous matters.

SECTION I.

THE DEVOLUTION OF REALTY AND PERSONALTY.

§ 4. Chattels real and personal.

5. What goes to the Heir, and what to the Executor.

I. Chattels Real.

1. *Terms*.

7. Chattel Interests in Lands go to the Executor.		7. Do not go in succession.
		8. Equitable Interest in Terms.

2. *Next Presentation*.

9. Next Presentation goes to Executor. or to the Heir.		10. Not to a Successor.
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*3. *Mortgages.*

§ 11. Legal Estate of Mortgagees in Fee goes to Heir.	§ 11. Mortgage Money goes to Executor.
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4. *Rents.*

12. Mode of reserving Rent. So as to carry it to the Heir. or to the Executor.	13. Executor or otherwise, when. 14. Annuity is properly personal Estate.
13. Arrearages of Rent goes to the —	

II. *Chattels Personal.*

15. What Chattels Personal go to the Heir.

1. *Heir-Looms.*

16. What they are. Things in the Nature of Heir-Looms.	16. Jewels, &c. Journals of the House of Lords. Delivery for Inspection.
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2. *Fixtures.*

17. Rule as to Things fixed to the Freehold. 18. Exceptions to the Rule. 19. As to Heir and Executor. 20. Devisee and Executor. 21. Executors of Tenant for Life and Remainderman.	22. Landlord and Tenant. 23. Meaning of the word "Fixtures." 24. As between Mortgagor and Mortgagee. In Case of Distress. of Execution. What passes in the Conveyance of the Freehold.
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3. *Trees and Emblements.*

25. Trees Parcel of the Inheritance. 26. What Timber Trees or otherwise. 27. Rule as to Windfalls.	28. Fruit of Trees, &c. go to the Heir. Emblements go to the Executor.
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4. *Certain Animals.*

29. Fish in a Pond.	Deer, &c. in a Park.
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§ 4. Personalty as distinguished from realty is known in law by the name of *chattels*, which are again distinguished into real and personal. *Chattels real* are terms for years of lands and tenements, next presentations, mortgages, estates by statute staple, statute merchant, and *elegit*, &c. Chattels personal are cattle, furniture, money and the like movables. Chattels are likewise distinguished into chattels in possession, which are in the immediate possession of the person *entitled, or chattels in action, technically [*6] called *choses in action*, which must be recovered by suit.

5. By the common law, an estate of freehold or inheritance, not being comprehended under the word chattels, goes to the heir, but chattels on the other hand regularly go to the executor; this rule however both as to chattels real and personal admits of exceptions and modifications, when considered

either as to the different kinds of representatives, as to landlord and tenant, or assignees in bankruptcy, &c., and lastly as between husband and wife.

I. Chattels Real.

6. Of chattels real which commonly go to the executor the following are entitled to notice: 1. Terms; 2. Next presentations; 3. Mortgages; 4. Rents; 5. Annuities.

1. *Terms.*

7. All leases and terms of lands, tenements and hereditaments which give a chattel interest only, go to the executor or administrator, but he has no interest in freehold terms or leases, therefore a term for one's own life or the life of another, being a freehold, goes to the heir and not to the executor, but a term for a thousand or ever so many more years, being less than a freehold, goes to the executor, and not to the heir. (a) (1) So, if a lease for years be made to a bishop, parson or other sole corporation, and his successors, yet it will go to his executor or administrator, for a corporation sole cannot take a chattel in succession, (b) for succession in a body politic is the same as inheritance of a private person, (b) but it is otherwise in case of a corporation aggregate of many, as a Dean and Chapter, Mayor and Commonalty, and the like; (b) so of a sole corporation by custom as the Chamberlain of London; (b) so in the case of the queen. (b)

*So, a limitation of a term for years to one in tail, vests the whole in the first taker, and the same shall go to his executors, and not to [*7] the heir. (e) So, a grant from the Crown of "the year, day, and waste" though made to one and his heirs, yet, being but a chattel, goes to the executor; (d) so, in the case of a tenancy from year to year as long as both parties please, the interest of the tenant goes to his executor or administrator, (e) or to a devisee; (f) but where a lease is made to several for a term of years as joint tenants, and one dies, his interest survives, and his personal representatives take nothing. (g) (2)

8. As a rule, courts of equity follow the law in their construction of chattel interests, to which a person may be equitably entitled, but terms to attend

(a) 1 Inst. 46, a.

(b) Fulwood's case, 4 Co. 65.

(c) Leonard Lovie's case, 10 Co. 87 a, 88 b; but see *Burgis v. Burgis*, 1 Mod. 115; *Duke of Norfolk's case*, 3 Cha. Ca. 30; *Fearne Cont. Rem.* 463; 2 Swanst. 454; see also *Theobridge v. Kilburne*, 2 Vez. 233; *Garth v. Baldwyn*, Id. 646.

(d) *Wentw. Off. Ex.* 132, s. 36.

(e) *Doc v. Porter*, 3 T. R. 13.

(f) *James v. Dean*, 11 Ves. 303.

(g) 1 Inst. 182, a.

(1) *Case of Gay*, 5 Mass. 419. *Cirenster v. Hill*, 1 N. H. 350.

(2) In Pennsylvania, by the act of 1812, survivorship as an incident to joint tenancy is taken away in every species of property, except in the case of a trust. This act applied to estates then in existence. *Bombaugh v. Id.*, 11 Serg. & Rawle, 191. This law is adopted in most of the States of the Union. 4 Kent Com. 361, 362.

the inheritance form an exception to this rule, being always allowed to follow the fee. See further as to trust terms, *post*, EQUITABLE ESTATES; also as to estates *pur autre vie*, *post* ESTATES FOR LIFE.

2. Next Presentation.

9. An advowson, of which a man is seised in fee, goes to the heir and not to the executor, but if the church becomes void in the lifetime of the patron, and he dies, the church being still void, the next presentation goes to the executor and not to the heir, being a chattel severed from the inheritance.^(h) So, if a person purchase the next presentation to a church, and die before it becomes void, this, as a chattel, shall go to the executor, and not to [*8] the heir;⁽ⁱ⁾ and it is said that the next presentation before the church *becomes void, is a chattel real, and, after it becomes void, a chattel personal;⁽ⁱ⁾ so, if there be tenant in tail, and the church happen to become vacant in his lifetime, and he die before he has presented, his executor, and not the issue in tail, shall present to his turn;^(k) so, if a vicarage happen to become void, and before the parson present, he is made a bishop, &c., yet he shall present to his turn, because it is a chattel vested in him;^(l) but if a man, seised in fee of an advowson, be parson of the church and die, his heir, and not his executor, shall present, for the descent to the heir and the fall of an avoidance happened at one instant, and where two titles concur in one instant, the elder right shall be preferred;^(m) and the grant of the next presentation of a living to J. S. during his life is limited, and will not carry the presentation to his executors on his dying before the church becomes vacant.⁽ⁿ⁾

10. A chattel does not go to the successor of a corporation sole.^(o) Therefore, where a prebendary, having the advowson of a rectory in right of his prebend, died while the church was vacant, held, that his personal representative had the right of presentation for that turn;^(p) but where a bishop dies, during the vacancy of a church of which he is patron, it is laid down that neither the bishop's executors, nor his successor, shall have the turn but the queen, by reason of the temporalities.^(q)

11. When a mortgage is in fee, the legal estate will go to the heir, and by a devise of all lands, lands which the testator had in mortgage were held [*9] to pass;^(r) but if the *mortgage is for a term of years, it will go to the executor, as other terms. It was also held, in some of the earlier cases, that the mortgage-money should go to the heir, if the personal assets

(h) *Stephens v. Wall*, Dy. 282, b; *Br. Ab.*, tit. *Present. al Esglise*; *Fitzherb. Present. al Esglises*, 7; *F. N. B.* 33, 34; 1 *Inst.* 388, a; *R. v. Canterbury (Archbp.)*, 4 *Leon.* 198; *Repington v. Tamworth School*, 2 *Wils.* 150; all recognised in *Rennell v. Lincoln (Bp.)*, 7 *B. & C.* 147.

(i) *Wentw. Off. Ex.* 54.

(k) *F. N. B.* 33.

(l) *Id.* 34.

(m) *Holt v. Winchester (Bp.)*, 3 *Lev.* 47.

(n) *Mann v. Bristol (Bp.)*, *Cro. Car.* 505; *S. C.*, *W. Jo.* 407.

(o) See ante, § 7.

(p) *Rennell v. Lincoln (Bp.)*, 7 *B. & C.* 113.

(q) *Brook's Abr. tit. Present. al Esglise*, 10; *F. N. B.* 33; 1 *Inst.* 90, a, *Harg. n.* (4); 2 *Roll. Abr.* 345.

(r) *Sir T. Littleton's case*, 2 *Vent.* 351; *S. C. nom. Winn v. Littleton*, 2 *Chan. Ca.* 51; *S. C.*, 1 *Vern.* 3.

were sufficient for the payment of the debts : (s) but it is now settled by a series of decisions that the executor, and not the heir, is entitled to the money ; (t) and the heir or devisee of the mortgagee will be a trustee for the personal representative, and will be directed to convey to him ; (u) (1) but the heir may, if he chooses, pay off the mortgage, and keep the land ; (x) and a mortgagee may by any declaration in his will convert the money into land for the benefit of his heir ; (y) and the devise of a mortgage estate, considered as irredeemable, will pass to the devisee, as land. (z)

4. *Rent.*

12. If a man, seised in fee, make a lease reserving rent generally, without saying to whom, it shall go to his heir and not to his executor ; (a) if reserved to him, his executors, and assigns, the rent shall determine at his death, because, rent being incident to the reversion, cannot go to the executors ; (b) (2) yet, if the words "during the term" be added in such a lease, it has been held that these words are sufficient to carry the rent to the heir ; (c) but, in the report of this case, (d) it is laid down, that the construction of reservations ought to be according to the reason and *equity of the thing ; and therefore, as, on the one hand, if a tenant in fee made a lease reserv- [*10] ing rent to him and his executors, the rent could not go to the executors ; so, on the other hand, if a lessee, for one hundred years, should make a lease for forty years, reserving rent to him and his heirs, that would go to the executor and be void for the heir ; so if tenant in tail made a lease reserving rent to him and his heirs generally, yet the rent would go to the issue in tail. But where a lessee for three lives assigned his whole estate, reserving a rent to him and his executors, held, that as no reversion was left in the lessor, his executors, and not the heir, were entitled to the rent ; (e) so, where a man seised in fee of one acre, and possessed of another acre for term of years, made a lease, rendering one entire rent, whereby the reversion of one acre

(s) *Titley v. Egerton*, 1 Chan. Rep. 181 ; S. C., 2 Freem. 125, citing *St. John v. Wareham* ; *Turner v. Crane*, Id. 242 ; *Anon. Nels.* 162.

(t) *Thornborough v. Baker*, 1 Chan. Cas. 233 ; *Ellis v. Guavas*, 2 Chan. Cas. 50 ; *Winn v. Littleton*, sup. ; *Canning v. Hicks*, 2 Chan. Cas. 187 ; S. C. 1 Vern. 412 ; *Paulett v. Att.-Gen.*, Hardr. 467. 469 ; *Weaver v. Maule*, 2 R. & My. 97. See further 3 Swanst. 630, and other cases there cited.

(u) *Canning v. Hicks*, sup. ; *Tabor v. Grover*, 2 Vern. 367 ; S. C. 2 Freem. 227.

(x) *Clerkson v. Bowyer*, 2 Vern. 66. (y) *Noys v. Mordaunt*, 2 Vern. 581.

(z) *Doe v. Parratt*, 5 T. R. 654. (a) 1 Inst. 47, a.

(b) *Ib.* ; 2 Roll. Abr. 450. (c) *Sacheverell v. Froggatt*, 2 Saund. 367.

(d) *Nom. Sacheverell v. Frogate*, 1 Vent. 161.

(e) *Jenison v. Lexington (Lord)*, 1 P. Wms. 555.

(1) That a mortgage is but a security for the payment of the debt and passes as an incident thereto, not descending to the heir, or considered real estate, is very generally held. *Schuyll v. Thoburn*, 7 Sergeant & Rawle, 419. *Wentz v. Dehaven*, 1 Id. 317. *Craft v. Webster*, 4 Rawle, 255. *Smith v. Dyer*, 16 Mass. 18, particularly under their local statute ; *Dewey v. Dewsens*, 4 Pick. 16. Even in courts of law where the jurisdiction is separated. *Norton v. Willard*, 4 Johns. 41. *Runyan v. Merseran*, 11 John. 534. *Jackson v. Barclay*, 5 Cow. 202. In case of possession taken by the mortgagee, the doctrine of a trust in the heir would be applicable. 4 Kent Com. 160.

(2) It accompanies the reversion, unless separated by express words, *Johnson v. Smith*, 3 Penna. 500. *Burden v. Thayer*, 3 Met. 78 ; to the heir, *Wright v. Williams*, 5 Cow. 501, or devisee, *Prevost v. Colder*, 3 Wend. 517.

would go to the heir, and of the other to his executors, held that the rent should be apportioned between the heir and the executor. (*f*)

13. But although rent be incident to the reversion, and shall go therewith, and be payable to the heir, yet the arrearages incurred and become payable in the lifetime of the lessor, shall go to the executor as part of his personal estate; (*g*) therefore, if a person, seised in fee, leased for years, reserving rent payable on certain days, if he died after either of the rent-days, all the rent due at the last rent-day would go to his executor; (*h*) but if he died before the day, then the rent, which would accrue due on that day, would go to the heir, (*i*) or to the devisee to whom the reversion was devised; (*k*) (1) [^{*11}] or to a jointress, (*l*) or to a *remainderman where a lessor was tenant for life. (*m*) If the lessor died on the rent-day after sunset, and before mid-night, the heir, it seems, and not the executor, should have the rent, for it was held not to be due until the utmost limit of the day, which does not end until twelve o'clock, although the time for demanding it be, for conveniency, any time before the sun sets. (*n*)

5. *Annuities.*

14. An annuity, so far as it charges the person only, and does not concern the land or savour of the realty, is a personal thing, (*o*) but, being an inheritance, cannot go to the personal representative. (*p*)

II. Chattels Personal.

15. The exceptions to the rule, that chattels go to the executor, are more numerous in the case of chattels personal than in that of chattels real, either in favour of the heir or of the freehold, as between real and personal representatives, landlord and tenant or assignees in bankruptcy, &c. These exceptions may be considered under the following heads:—1. Heir-looms; 2. Fixtures; 3. Emblements; 4. Certain Animals.

(*f*) *Moodie v. Garnance*, 3 Bulstr. 153; S. C. nom. *Moody v. Gannon*, Moore, 848; S. C. nom. *Wood v. Germans*, Cro. Jac. 390, in which two latter cases no decision on this point is reported.

(*g*) Off. Ex. 53, 54; *Godolph.*, part 2, c. 13, s. 3.

(*h*) *Clun's case*, 10 Co. 123.

(*i*) *Anon.* 34 H. 8, cited in *Clun's case*, sup.; S. C. *Clun v. Fisher*, Cro. Jac. 309; S. P. *Drowt's case*, Moore, 726, pl. 1012.

(*k*) *Sacheverel v. Frogate*, 1 Vent. 148. 161.

(*l*) *Rockingham (Lord) v. Oxenden*, 2 Salk. 578; S. C. nom. *Rockingham (Lord) v. Penrice*, 1 P. Wms. 177.

(*m*) *Strafford (Earl) v. Wentworth (Lady)*, Prec. Chan. 555.

(*n*) *Duppa v. Mayo*, 1 Saund. 287. And see *Plowd.* 172, 173; 1 Inst. 202; *Clun's case*, sup.; Cro. El. 575; *Rockingham (Lord) v. Oxenden* or *Penrice*, sup. See also, contra, *Strafford (Earl) v. Wentworth (Lady)*, sup., and the distinction taken between a common lease, and a lease under a power.

(*o*) 1 Inst. 20.

(*p*) Doct. and Stud. c. 30, p. 97. See further, post, § 259 et seq.

(1) It cannot be apportioned as to time, *Bank v. Wise*, 3 W. 404, ante 9, n. 2, even though the lease terminate by condition, *Zule v. Id.* 24 Wend. 76; *Fitchburg v. Melven*, 15 Mass. 268; but this is altered in the case of a decedent in Pennsylvania by act of 1834. Sec. 7.

1. *Heir-Looms.*

16. Heir-loom is such goods and chattels as go by special custom to the heir along with the inheritance, and not to the executor or administrator of the last owner of the *estate, and are said to be the best thing of every sort, as of beds, tables, pots, pans, carts, and other movables. *(q)* [*12] They are due by custom and not by the common law, and the heir may have an action for them and shall not sue for them in the Ecclesiastical Court; but they are not devisable. *(r)*

There are, besides, other things in the nature of heir-loom, as monuments, coat-armour, pennons, and other ensigns of honour which belong to a man's degree or order, and are usually set up in the church; and although the freehold of the church be in the parson, yet he cannot deface or remove these things, but the heir may have an action against him for so doing; *(s)* so, on the same principle the ornaments of the chapel of a bishop, though he is a corporation sole, *(t)* shall nevertheless go to his successor, as an heir-loom; *(u)* and this rule is said to apply to such things, belonging to a parsonage, as have gone from successor to successor; *(x)* but the property in the shroud and coffin belongs to the executor or administrator, and may be laid to be theirs in an indictment for stealing them. *(y)*

So, although a man devise all his jewels, &c. to his wife, yet his garter and collar of S. S. shall go to his heir, in the way of heir-loom. *(z)* And it seems that on the same principle the journals of the House of Lords, delivered to a peer, should go with the title. *(a)* So, the Court of Chancery has power to compel the delivery of chattels personal in the nature of heir-loom; and on motion the plaintiff was allowed the inspection of the articles which he claimed in a chest at the defendant's bankers, though in his answer he insisted on a lien. *(b)* (1)

*2. *Fixtures.*

[*13]

17. It is a rule that things fixed to the freehold become parcel thereof, and go to the heir, not to the executor; *(c)* therefore, if a tenant affixed any thing, he could not on his quitting remove it; *(d)* so goods and chattels annexed to the freehold go to the heir and not to the executor, as glass in a window, doors and locks of a house, &c.; *(e)* so pictures, glasses, &c., fixed instead of wainscoat. *(f)*

(q) Bro. Discent, pl. 43; 1 Inst. 18, b.

(r) 1 Inst. 185, b.

(s) *Ib.*; *Frances v. Ley*, Cro. Jac. 367.

(t) See ante, § 7.

(u) *Corwen's case*, 12 Co. 105.

(x) 4 Burn's Ecc. L. 413, Phil. ed.

(y) 2 Russell on Crimes, 142.

(z) *Earl of Northumberland's case*, Ow. 124.

(a) *Upton v. Ferrers* (Lord), 5 Ves. 806, sed quære.

(b) *Macclesfield (Earl) v. Davis*, 3 V. & B. 16.

(c) 21 H. 7, 26, 27; *Keilw.* 88; *Roll. Abr.* 919; *Off. Ex.* 62; *Ow.* 70, 71.

(d) *Cooke's case*, Moore, 177.

(e) *Herlakenden's case*, 4 Co. 63.

(f) *Cave v. Cave*, 2 Vern. 508.

(1) In Maryland, *heir-loom* is expressly excepted from the operation of the statute, 1798, ch. 7, s. 1, which gives to executors things annexed to the freehold which may be removed without prejudice, &c. *Laws of Maryland*, vol. 1, p. 339.

18. This rule, though relaxed, as between the personal representatives of tenant for life or of tenant in tail and the remainderman, and still more so as between landlord and tenant, is adhered to with considerable strictness, as between the heir or devisee of tenant in fee and the executor; but even here there have been some instances of relaxation, and therefore it will be necessary to consider each of these cases in their order.

19. First, as between heir and executor, a distinction has been taken between things accessory to the carrying on trade, or essential to the enjoying of the inheritance; (*g*) therefore, in a case before Lord C. B. Comyns cited in *Lawton v. Lawton*, (*h*) (1) a cider-mill though affixed to the freehold, was held to go to the executor and not to the heir; but in *Lawton v. Salmon*, cited in *Fitzherbert v. Shaw*, (*i*) which was a case of salt-pans erected by the tenant in fee, and used in the salt works, they were held to go to the heir, and not to the executor, because they were necessary to the enjoyment of the inheritance. Again, a distinction has been taken, grounded on the custom of the country; (*k*) and also whether they are *fixtures set up [*14] merely for domestic convenience, (*l*) so determined, says the report, contrary to *Herlakenden's* case; (*m*) and so in *Beck v. Rebow*, (*n*) hangings and looking-glasses, being mere matters of ornament, were taken not to be part of the house or freehold; and a similar decision was come to in *Harvey v. Harvey*, (*o*) as to hangings, tapestry, and iron backs to chimneys; but in *Winn v. Ingilby*, (*p*) set-pots, stoves, grates, coppers, and other things which could not be removed without doing injury to the freehold, were held to go to the heir, and not to the executor.

20. A devisee differs from an heir no further than as his claims may be affected by the terms of the will, and the presumed intention of the testator; therefore, where the devise was of a copyhold estate, consisting, *inter alia*, of a brewhouse and malthouse, with the plant and utensils, held that the plant passed with the brewhouse, as the latter would have been of no use without it; (*q*) so, by a devise of a West India plantation, the stock, implements, utensils, &c. will pass. (*r*)

21. As between the executors of tenant for life and remainderman, it has been held in two cases, that an engine set up for the benefit of a colliery and the increase of trade, should go to the executor, and not to the remainderman. (*s*) (2)

(*g*) *Elwes v. Maw*, 3 East, 53.

(*h*) 3 Atk. 15.

(*i*) 1 H. Bl. 259.

(*k*) Vin. Abr. tit. "Executors," (U. 74.)

(*l*) *Squire v. Mayer*, 2 Eq. Cas. Abr. 430; S. C. 2 Freem. 249.

(*m*) 4 Co. 63.

(*n*) 1 P. Wins. 94.

(*o*) 2 Str. 1141.

(*p*) 5 B. & A. 625; *Colegrave v. Dias Santos*, 2 B. & C. 76; *King v. St. Dunstan*, 4 B. & C. 686; S. C. 7 D. & R. 178.

(*q*) *Wood v. Gaynon*, Amb. 395.

(*r*) *Lushington v. Sewell*, 1 Sim. 435.

(*s*) *Lawton v. Lawton*, 3 Atk. 13; *Dudley (Lord) v. Ward (Lord)*, Amb. 113.

(1) *Holmes v. Tremper*, 20 Johns. 29.

(2) The remainderman's right will not be affected by an agreement between the tenant for life and the termor, in the case of an erection of frame shops and a stable. *White v. Arndt*, 1 Wh. 9. Nor can the latter remove, after the termination of his term by the death of his lessor. *Id.*

22. As between landlord and tenant the rule has been relaxed very considerably in favour of the latter; a tenant may therefore now remove any buildings which have been *erected by himself for the purposes of [*15] trade,(t) particularly if erected upon blocks, and not fixed in or to the ground,(u) provided he removes them before the expiration of the term;(x) or during such further period of possession by the tenant, as he holds under a right to consider himself as tenant;(y) but in *Elwes v. Maw*,(z) it was held that the exception in favour of the tenant, with regard to trade fixtures, did not extend to buildings erected for the purposes of agriculture;(1) therefore, where a tenant in agriculture erected a beast-house and other buildings which were let into the ground, held, that he could not remove the same, though during his term, and he left the premises in the same state as when he entered. But even agricultural buildings may be so erected as to fall within the exception; therefore, where a tenant removed the soil of the demised land, and placed therein stone staddles, in some places with a brick foundation, and erected upon the staddles a thatched wooden barn, which was kept in its place upon the staddles by the pressure of the superincumbent weight alone, held, that he might remove the woodwork and thatch, but not the foundation.(a)

23. The word "fixtures" does not necessarily imply things fixed to the freehold;(b) therefore, window sashes neither hung nor beaded into the frames, but merely fastened by laths nailed across the frames, have been held not *to be fixed to the freehold;(c) so, a pump being an article of domestic use, erected so as to be removable without injury to the [*16] freehold;(d) so, a cornice fixed up by screws;(e) so an ornamental chimney-piece;(f) *sed secus* if the chimney-piece be not ornamental, and also if the pillars of brick and mortar be built on a dairy floor, although not let into the ground;(f) and if the erection be let into the ground, or cemented, or otherwise united to any erection, that is let into the ground, it cannot afterwards be removed, although it be merely for ornament; therefore a conservatory

(t) *Penton v. Robart*, 2 East, 88. See also *Pooler's case*, 1 Salk. 368.

(u) *Culling v. Tuffnell*, Bull. N. P. 34, cited *Elwes v. Maw*, 3 East, 41; *Dean v. Allaley*, 3 Esp. N. P. C. 11.

(x) 20 H. 7, 13, cited in *Elwes v. Maw*, sup.; *Fitzherbert v. Shaw*, 1 H. Bl. 258, recognised in *Lyde v. Russell*, 1 B. & Ad. 394; *Marshall v. Lloyd*, 2 M. & W. 450.

(y) *Weeton v. Woodcock*, 7 M. & W. 19, recognising *Marshall v. Lloyd*, sup. See also *Mackintosh v. Trotter*, 3 M. & W. 184; *Lee v. Ridsen*, 7 Taunt. 188. (z) Sup.

(a) *Wansborough v. Maton*, 4 Ad. & Ell. 884; S. C. 6 Nev. & Man. 367; S. C. 2 Har. & Wol. 37, recognising *R. v. Otley*, 1 B. & Ad. 161.

(b) *Sheen v. Rickie*, 5 M. & W. 175.

(c) *R. v. Hedges*, 1 Leach, C. C. 201; 2 East, P. C. 590, n.

(d) *Grymes v. Boweren*, 6 Bing. 437; S. C., 4 M. & P. 143.

(e) *Avery v. Cheslyn*, 3 Ad. & Ell. 75; S. C. 5 Nev. & M. 372; S. C., 1 Har. & Wol. 283. (f) *Leach v. Thomas*, 7 C. & P. 328.

(1) Tenant for years erecting a brick house and cellar used for a dairy, and residing with his family in the upper part of the house, permitted to remove; the question whether it was for purposes of trade being the only one, and the principle of *Elwes v. Maw*, excluding fixtures for agricultural purposes, considered inapplicable, *Van Ness v. Picard*, 2 Pet. 137-46; and in *Troup v. Smith*, 20 John. 29, the same principle is ruled in case of a cider mill, however it may be annexed to the ground, p. 32: and it is said though the tenant would be a trespasser for entering after the determination of the term, yet the property in the mill would not pass to the landlord.

which was attached to a dwelling house by means of cantilevers let into the wall, was held to be so annexed to the freehold, that the removal of it was considered waste.(g) And a question, whether a fixture can be removed by a tenant without substantial injury to the freehold, is proper for a jury, upon an issue whether it is removable by law.(h)

24. The principle that things fixed to the freehold cannot be removed but must go therewith has been adhered to in other cases, as between mortgagor and mortgagee, in cases of distress or execution, or bankruptcy, as also on the conveyance of the freehold.(1) As between a mortgagor and mortgagee, the former is to many intents considered as tenant to the latter, or may be so treated by him at his election ;(i) therefore, where a mortgagor became bankrupt, held, that his assigns could not remove the fixtures from the premises, whereby they should become dilapidated.(k)

Things such as coppers, grates, &c. which, under circumstances, may be removable by a tenant, are nevertheless, *not to be distrained ;(l) but [*17] it is doubtful whether machinery fixed by bolts to a floor, is distrainable,(m) and in an early case it was decided that although a stone was severed from a mill for the purpose of being picked, yet it remained notwithstanding parcel of the mill, and could not be distrained,(n) *sed secus* if it were another stone lying loosely by.(n) Things wrongfully severed by a tenant, as machinery belonging to a mill, cannot be taken in execution, under a *fi. fa.* ;(o) and before the late Acts making all real property liable to the debts of the owner, particularly the 1 & 2 Vict. c. 110,(p) a dyer's vat, fastened to the wall of the house, could not be taken in execution under a *fi. fa.* ;(q) so set pots, ovens, and ranges belonging to the plaintiff's freehold, for as these would go to the heir and not to the executor, they were not liable as

(g) *Buckland v. Butterfield*, 2 B. & B. 54; S. C. 4 B. Moore, 440.

(h) *Avery v. Cheslyn*, sup.

(i) *Partridge v. Bere*, 5 B. & A. 604.

(k) *Hitchman v. Walton*, 4 M. & W. 409.

(l) *Danby v. Harris*, 1 Gale & D. 234.

(m) *Duck v. Braddyll*, *McClel.* 217; S. C. 13 Price, 459.

(n) M. H. 8, fo. 25, pl. 6.

(o) *Tarrant v. Thompson*, 6 B. & A. 825; S. C., 2 D. & R. 1.

(p) See Dig. P. ii. tit. Execution, 1.

(q) *Day v. Bisbitch*, Cro. El. 374.

(1) As between the owner of the land and third persons, fixtures are part of the realty, and can only be sold as such. *Owes v. Ogilby*, 7 W. 106. They will pass by a mortgage of the realty, and the purchaser under it is entitled against a purchaser under a *fi. fa.* *Voorhees v. Freeman*, 2 W. & S. 116. *Pyle v. Pennoek*, id. 390. Even though they be parts of the machinery which have never been in use, id., provided they are essential to the completeness of the mill as such, or are kept to replace injuries by breakage, id. *Gray v. Holdship*, 17 S. & R. 415. And it is said by Gibson, C. J. in *Voorhees v. Freeman*, 119, this rule prevails between vendor and vendee, heir and executor, debtor and execution creditor, and co-tenants of the inheritance.

But in *Gale v. Ward*, 14 Mass. 352, the carding machines in a wool carding factory were considered liable as other personal property; and the same point was held in *Walker v. Sherman*, 20 Wend. 636, in the case of a partition. In these cases, physical annexation seemed to be relied on as the test, for the machines had passed with the mill under many conveyances. In *Farrar v. Stackpole*, 6 Greenl. 155, all the necessary appendages to a mill, without regard to physical annexation, were held to pass by a conveyance of the mill.

As between the creditor of the tenant and the landlord, it seems the same rule prevails as in the case of the tenant himself. *Lemar v. Miles*, 2 W. 330.

For a general view of the American cases on this point, consult *Elwes v. Maw* in *Smith's Sel. of Leading Cases*, n. by Am. ed.

goods and chattels to be taken in execution ;(r) and so in *Steward v. Lombe*,(s) where a close on which a windmill was erected, was mortgaged for a term of years, and in the same deed there was a conveyance of the mill to the mortgagee in fee, held, that the mill, being incident to the land, could not be taken in execution. The rule has also been applied to cases of bankruptcy, where the question is, what is in the order and disposition of a bankrupt so as to pass to his assignees, it being held that as goods and chattels are the only property mentioned in the statute, lands and fixtures are not affected thereby :(t) therefore, stills and other things affixed to the freehold, are not within the order and disposition of the bankrupt ;(u) so, [*18] *stoves, grates, and other things legally fixed to the premises, though removable by the tenant, are nevertheless held to be not in the order and disposition of a bankrupt within the statute ;(x) so, shares in a bridge company have been held not to pass to the assignees,(y) *sed secus* as to such shares where by the Act they are declared to be personalty.(z)

On this same principle, that whatever is once annexed to the freehold cannot be severed, fixtures will pass in a conveyance of the freehold ; therefore where the owner of a freehold house, in which there were various fixtures, sold it by auction, and no mention was made of the fixtures, held, that they passed with the conveyance of the house ;(a) and by a mortgage of a mill, the stones, tackling, and implements necessary for the working of the mill pass to the mortgagee ;(b) so, where a lessee for years mortgaged his estate and interest in the premises, held, that the mortgagee might declare, as reversioner, against the assignee of the tenant for the removal of the fixtures ;(c) but in *Archer v. Bennett*,(d) where a man was seised of a close, on one part whereof was a house, and on another part thereof was a kiln, and also two mills adjoining to the close, and he sold the mills *cum pertinentiis*, held that the kiln and the part of the close whereon it stood, did not pass ; for, by the grant of a messuage or land *cum pertinentiis*, any other land or thing will not pass ; but it seems that it would have been otherwise, if it had been shewn that the kiln was necessary for the use of the mills.

*3. *Trees and Emblements.*

[*19]

25. All trees are parcel of the inheritance and go to the heir ; if, therefore, a man convey his lands by bargain and sale, and all trees by express words,

(r) *Winn v. Ingilby*, 5 B. & A. 625.

(s) 1 B. & B. 506 ; 4 J. B. Moore, 281.

(t) *Ryall v. Rowles*, 2 Vez. 348. 374 ; S. C., nom. *Ryall v. Rolle*, 1 Atk. 165 ; 1 Wils. 260.

(u) *Horn v. Baker*, 9 East, 215, recognised in *Clarke v. Crownshaw*, 3 B. & Ad. 804, and *Coombs v. Beaumont*, 5 B. & Ad. 72 ; S. C., 2 Nev. & Man. 235.

(x) *Boydell v. McMichael*, 1 Cr. M. & R. 177 ; Ex parte *Wilson*, 4 Deac. & C. 314 ; Ex parte *Belcher*, Id. 703.

(y) Ex parte *Vauxhall Bridge Company*, 1 Gl. & J. 101.

(z) Ex parte *Lancaster Canal Company*, Mon. 116 ; S. C., on Appeal, Mon. & B. 94 ; 1 Deac. & C. 411. See also *Buckridge v. Ingram*, 2 Ves. jun. 252, where a share in the New River Company was held to be realty, there being no provision in the Act to make the shares personalty.

(a) *Colegrave v. Dios Santos*, 2 B. & C. 76 ; S. C. 3 D. & R. 255.

(b) *Place v. Fagg*, 4 Man. & Ry. 277.

(c) *Hitchman v. Walton*, sup.

(d) 1 Lev. 131.

and the lands do not pass for want of inrolment or otherwise, the trees do not pass ;(e) and if a man lease lands for life or years with all trees, the trees pass only, as they are annexed to the land, and the lessee shall not cut them ;(f) but, if a man grants all his trees, they are absolutely seised in law and passed away from the grantor and his heirs, and being vested as chattels in the grantee, pass to his executors ;(g) yet, though the soil itself does not pass, a sufficient nutriment out of the earth, for the vegetation of the trees is granted ;(h) so if a man sells his land reserving the timber trees, they remain as a chattel in him, distinct from the soil, and shall go to his executors ;(i)(1) but if the feoffee afterwards buy the trees, they are re-annexed to the inheritance ;(k) yet if tenant in fee-simple lease the land for years, excepting the trees, and afterwards grants the trees to the lessee, they are not re-annexed to the inheritance, but remain absolutely in the lessee, and will go to his executors ;(k) so, if tenant for life, without impeachment of waste, with power to cut trees, and to make leases for three lives, &c., leases for three lives, except the trees, and dies before cutting, the trees are re-annexed and his executor cannot cut them.(l) So, if tenant in tail sells the trees to another, they go to the executors of the vendee ;(m) but if they are not felled in the lifetime of the tenant in tail, they go to his issue, and neither the vendee nor his executor can have them.(n)

[*20] 26. *By the term "timber" is meant properly such trees only as are fit to be used in building, as oak, ash, and elm ; but some trees may, by the custom of the country, be reckoned timber which are not properly so, as birch, beech, &c. ;(o) so, walnut trees, being of considerable value, may be estimated as timber ;(o) therefore, the birch, from the use made of it in Yorkshire for cottages, sheep-houses, and such other mean buildings, has been held to be timber,(p) and therefore it belonged to the inheritance and could not be cut by tenant for life ;(p) so, willows in Hampshire ;(q) and although it has been said that pollards are not timber,(r) yet the better opinion appears to be, that if the bodies of them be sound and good, they shall be deemed timber,(s) *sed secus* if they are not sound, for then they are good for nothing but fuel ;(t) the same may be said of dotards, if they have any timber in them.(u)

(e) Lifford's case, 11 Co. 43.

(f) Dy. 374, pl. 18 ; S. C., nom. Billingsby v. Hercy, Moor, 831 ; 2 Bulst. 6.

(g) Stukeley v. Butler, Hob. 173.

(h) Lifford's case, 11 Co. 49.

(i) Lifford's case, sup., Stukeley v. Butler, sup.

(k) Herlakenden's case, 4 Co. 63, b.

(l) Latch, 163.

(m) Lifford's case, sup.

(n) Ib. ; Bro. Contract, 26 ; 11 Co. 50 ; Poph. 194.

(o) Chandos (Duke) v. Talbot, 2 P. Wms. 606.

(p) Countess of Cumberland's case, Moor, 812.

(q) Guffy v. Pindar, Hob. 219.

(r) Soby v. Molyne, Plowd. 470.

(s) Chandos (Duke) v. Talbot, sup.

(t) Ib. See also Herlakenden's case, 5 Co. 62 ; Rabbet v. Raikes, Woodf. Land. and Ten. 429, Har. & Wol. ed.

(u) Countess of Cumberland's case, sup. See Channon v. Patch, 5 B. & C. 897 ; S. C. 5 D. & R. 651.

(1) By a conveyance reserving all the pine timber of a particular size, the trees remain the property of the grantor, with so much soil as is necessary to support them. Tucker v. Andrews, 1 Maine, 122 ; aliter if in a grant in fee the reservation be of all timber which may grow there forever—that is an estate of inheritance. Clap v. Draper, 4 Mass. 266.

27. The timber while standing is part of the inheritance, but whenever it is severed, either by the act of God, as by a tempest, or by a trespasser, or by wrong, it belongs to him who has the first estate of inheritance, whether in fee or in tail, who may bring trover for it; and this was so decreed upon occasion of the great windfall of timber on the Cavendish estate, per Lord C. King; (x) and where there is an infant entitled to the contingent inheritance, the Court of Chancery will see that the money arising from the sale of such windfalls shall be secured for his benefit. (y)

28. *As the trees unless severed, belong to the heir, (z) so does the fruit which they bear, as apples, pears, &c., belong to the [*21] heir; (a) so, grass growing, though fit to be mowed down for hay, shall go with the land; (a) (1) so, roots of all kinds, such as parsnips, turnips, &c., belong to the heir, for these cannot be come at without digging up the soil, which must necessarily be a spoil and injury to the inheritance. (b) But corn, though growing, and every thing else which is produced annually by labour and cultivation, shall go to the executor and not to the heir, as hops, saffron, hemp, &c.; (c) (2) therefore, if lessee for life of a hop-ground dies in August before severance, the executor may maintain trover for them against the remainderman. (d) These annual fruits of the earth are in law termed *emblements*, of which see further, post, *ESTATES*. As to contracts under the Statute of Frauds, respecting lands and chattels, see Dig. P. ii. tit. Frauds (Statute); as to the distinction between realty and personalty in respect of waste, see post, *INJURIES TO THINGS REAL*. See also Amos and Ferard, Law of Fixtures, *passim*.

4. Certain Animals.

29. The law respects the freehold and inheritance in regard to certain animals, although all animals are otherwise chattels; therefore if a man has fish in his pond, and dies, the fish go to the heir, for they are considered as the profits thereof, and therefore descend with the pond to the heir; (e) but if fish are in a trunk or net, or the like, it is otherwise, and they go to the executor, for they are severed from the soil. (f) So, deer in a park, (g) i. e. a park properly so *called; (h) so, conies in a warren, and doves in a [*22] dove-house, young and old, shall go to the heir. (i)

If a party has but a term of years, still such things will go to his executor, as accessory to the land, (k) but he must leave sufficient of the animals for stores. (l)

(x) *Bewick v. Whitfield*, 3 P. Wms. 268. See also *Channon v. Patch*, 5 B. & C. 897; S. C. 8 D. R. 651. (y) *Ib.*; *Bewick v. Whitfield*, 3 P. Wms. 266.

(z) See ante, § 25.

(a) *Off. Ex.* 59; *Godolph.* 122.

(b) *Off. Ex.* 62, 63.

(c) *Off. Ex.* 59.

(d) *Latham v. Atwood*, Cro. Car. 515.

(e) *Parlet v. Cray*, Cro. El. 372; *Grey's case*, Ow. 20.

(f) 1 Inst. 8.

(g) *Off. Ex.* 127; *Godolph.*, p. 2, c. 14; *Swinb.* p. 6, s. 7, 14th ed.

(h) *Withers v. Iseham*, 1 Dy. 70, a, 1; 2 Inst. 199; *Davis v. Powell*, Willes, 46.

(i) 1 Inst. 8. And see further as to game, Dig. P. iii. tit. Game.

(k) *Off. Ex.*, sup.

(l) 1 Inst. 53.

(1) *Emaus v. Turnbull*, 2 John. R. 322.

(2) Corn or other product of the soil raised annually by labour and cultivation go to executor. *Penhallow v. Dwight*, 7 Mass. 34.

SECTION II.

LIABILITY FOR THE PAYMENT OF DEBTS.

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Not where there is a Devise.</p> | <p>55. Exceptions.
56. Creditor's Lien.
57. Other Cases in favour of Legatees.
58. Legacies to Charitable Uses.
59. In favour of a widow in respect of her Paraphernalia.</p> |
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§ 30. The distinction between real and personal property as to their liability to the debts of the owner is of less importance now than formerly, (m) yet it is entitled to consideration in these respects; 1. As they are assets for the payment of debts; 2. As they form a fund for the payment of debts.

(m) See Com. Dig. P. ii. tit. Debts, P. ii. tit. Courts (Equity.)

I. Assets for the Payment of Debts.

31. *Assets* from the French *assez*, sufficient, is a term in law applied to the property of a deceased person, so far as it is sufficient for or applicable to any given purpose, as formerly, to make a warranty a bar to an estate tail,⁽ⁿ⁾ or more particularly *assets* for the payment of debts. *Assets* are distinguished into personal or real.

Personal assets, or *assets entre mains*, as they used to be called,^(o) are what comes into the hands of the executor or administrator to be applied for the payment of debts.

Real assets, or *assets per descent*, as they are commonly called, are what descend to the heir, and are in like manner applicable for the payment of debts. What has been deemed personal *assets* need not here be particularized further than is necessary to distinguish them from real **assets*. As to the distinction between legal and equitable *assets*, [^{*24}] see *infra*, § 41.

32. At common law personal property has in all cases been deemed *assets* in the hands of the executor, but it was otherwise with real property, which in the hands of the heir was deemed *assets* only in certain cases, as where the ancestor bound himself and his heirs in an obligation, there the obligee might have an action against the heir, and recover to the value of the *assets* descended,^(p) but the heir must have been expressly named, otherwise he was not chargeable;^(q) so, if the heir, before action brought, aliened the land, the obligee was without remedy at law, although it was otherwise in equity;^(r) but the 3 & 4 W. & M. c. 14, amended and extended by 11 G. 4 & 1 W. 4, c. 47, has made not only the heir but also the devisee answerable for debts upon specialty; and an heir of an heir is liable;^(s) (1) so, also, as it seems, an executor or administrator of an heir;^(t) so, in debt against the heir upon an obligation made by his ancestor, the plaintiff by the common law should have all the land which descended to the heir in execution against him, although in that case only was land liable to the execution of the debt of a common person at common law; and the reason assigned for this exception is, that the law gave an action of debt against the heir, but if the plaintiff should not have execution of the lands against the heir, he could have no fruit of his action.^(u)

By the 13 E. 1, c. 18, land was first subjected to the execution of a judgment or recognisance by means of the writ of *elegit* which gave a moiety of land, and has now, by the 1 & 2 V. c. 110,^(x) been extended to the whole of the land. By the 3 & 4 W. 4, c. 104, lands copyhold, as well as freehold, are made *assets* for the payment of debts, **not* only upon specialty, but also debts by simple contract. See further, Dig. P. [^{*25} i. tit. Debt, P. ii. tit. Courts (Equity.)

(n) 1 Inst. 374, b.; Bro. Assets per Desc. 4, 21.

(o) Bro. Assets, sup.

(p) Plowd. 441.

(q) Plowd. 440; 2 Inst. 19.

(r) 1 P. Wms. 777. See Dig. ii. tit. Courts (Equity.)

(s) Dy. 368, a., Ca. 46.

(t) Henningham's case, 3 Dy. 344, a.; Plowd. 441.

(u) Harbert's case, 3 Co. 12 a.

(x) See Dig. P. ii. tit. Execution.

(1) Waller's Executors v. Ellis, 2 Munf. 88.

33. As to what things are real *assets*. Lands are first entitled to notice; they must be freehold, and descend to the heir in fee-simple, not lands in fee tail; *(y)* (1) so, they must be lands taken by descent, and not by purchase; *(z)* but it was decided before the 3 & 4 W. 4, c. 106, altering the law of purchase and descent, that a man could not by any form of conveyance whatever raise a fee-simple to his own right heirs, by the name of heirs, as a purchase, so as to prevent the reversion from being *assets*; *(a)* so, lands in ancient demesne shall be *assets*; *(b)* so, lands in gavelkind; *(c)* so, lands descending to an heir, after an intermediate descent; *(d)* so, lands descended on the part of the mother, as well as land on the part of the father; *(e)* so, where there is a trust in fee, it is made *assets* by descent by the Statute of Frauds. *(f)*

34. An advowson appendant to a manor is unquestionably *assets*, "because the manor itself being *assets*, what is appended must be assets likewise;" *(g)* and it seems to be now settled after some discussion that an advowson in fee in gross is also *assets*. *(h)* The next avoidance in a church, on the other hand, though a chattel real, is not *assets* in the hands of an executor, because it is deemed to be of no value; but if in a *quare impedit* against a stranger [*26] who wrongfully *presents, the executor recovers damages, the money so recovered will be *assets* in his hands. *(i)*

35. A reversion in fee, expectant upon a term for years, is held both at law and in equity to be present *assets*; so that the heir cannot plead *riens per descent* in delay of execution of the rent and reversion, though the plaintiff cannot have the benefit of the reversion until the lease be determined, *(k)* and the possession of the tenant becomes that of the heir on the death of the ancestor and makes an actual freehold in him, so that by such seisin his heir becomes liable to a bond debt incurred by him in respect of lands descended; *(l)* so, a reversion expectant upon an estate for life is *assets*, *(m)* (2) but a reversion in fee expectant upon an estate tail is not

(y) 2 Dy. 121, a., Ca. 38.

(z) Emerson v. Inchbird, 1 Ld. Raym. 728.

(a) Godolphin v. Abingdon, 2 Atk. 57.

(b) H. 4. 14, cited Bro. Assets per Descent, pl. 11.

(c) Hawtrie v. Auger, 2 Dy. 239, a.; S. C. nom. Hawtre v. Anger, Moor. 74; Roll v. Osborn, Hob. 25; 1 Inst. 376, b.; Game v. Symms, Cro. Jac. 217.

(d) Anon., Dy. 368, a., Ca. 46. *(e)* Roll v. Osborn, sup.; 1 Inst. sup.; W. Jo. 88.

(f) King v. Ballett, 2 Vern. 248. *(g)* Per Ld. Hardwicke, C. 3 Atk. 465.

(h) 1 Inst. 371, b.; Sav. 119; Robinson v. Tonge, 2 Eq. Ca. Abr. 509; S. C., 1 B. P. C. 114; cited 3 Atk. 464; Ripley v. Waterworth, 7 Ves. 447.

(i) Went. Off. Ex. 173, 14th ed.

(k) Smith v. Angell, 2 Ld. Raym. 783; S. C., 1 Salk. 354; S. C., 7 Mod. 40; Villers v. Handley, 2 Wils. 49.

(l) Bushby v. Dixon, 3 B. & C. 298; S. C., 5 D. & Ry. 126.

(m) Rooke v. Cleland, 1 Ld. Raym. 53; S. C. 1 Lutw. 503. But in Fortrey v. Fortrey, (2 Vern. 134,) a judgment was recovered against an heir, who had a reversion in fee descended to him, and it was held, that the creditor could not compel the heir to sell the reversion, but must wait until it fell. See, however, Tyndale v. Warre, Jacob, 212.

(1) In Pennsylvania, estates tail are subject to be sold for debts, for the life of the tenant, being the debtor. Sharpe v. Pettit, 4 Y. 416. But in many of the States of the Union, they have been abolished or modified, and subjected to debts. 4 Kent, Com. 14, 15, and n.

(2) Leverett v. Armstrong, 15 Mass. 26. Whitney v. Whitney, 14 Mass. 88. All possible titles, contingent or otherwise, may be sold, in Pennsylvania. Humphreys v. Id., 1 Y. 427. Hurst v. Lithgow, Id. 24. Burd v. Dansdale, 2 Bin. 80. Rieckert v. Madeira, 1 Raw. 329. Jarrett v. Tomlinson, 3 W. & S. 114.

assets, because it lies in the will of the tenant in tail to bar it at his pleasure,⁽ⁿ⁾ but after the tail is spent it is *assets*,⁽ⁿ⁾ and such a reversion is *assets* for the debt of the first person who was in possession, and who created the reversion;^(o) it is however not settled whether it be *assets* for the debt of any intermediate taker. In *Smith v. Parker*,^(p) it was decided that such a reversion is *assets*, but the correctness of this decision has been questioned in *Tweeddale v. Coventry*,^(q) and *Doe v. Hutton*.^(r)

36. An estate *pur autre vie* to a man and his heirs is real *assets*, and is made liable by the Statute of Frauds to debts *by specialty.^(s) On the other hand, a like estate to executors and administrators is personal *assets*.^(t)(1) [*27]

37. Personal *assets* in any part of the world are *assets* in every part of the world;^(u) so, if there be lands in different counties, they should be equally *assets* by descent.^(v) In *Noell v. Robinson*,^(x) it was held, that a thing, although an inheritance, being in a foreign country, was nevertheless a chattel; but in *Gardiner v. Fell*,^(y) it was referred to the Master to inquire what interest the testator had in lands situated in a foreign country, whether personal or real. By the 5 Geo. 2, c. 7, houses and lands, and other hereditaments situate in any British plantation in America, shall be deemed *assets* for the payment of debts; and by the 9 Geo. 4, c. 33, a similar provision is made in respect to real property belonging to all persons, not Mahomedans or Gentoos, situated in India.

38. To constitute an inheritance *assets*, it must be something certain, as lands, rents, commons, and the like;^(z) therefore, a rent seck, which descended to the heir, and for which he had no remedy, was not *assets*, until he had gained seisin.^(a) So, an annuity is not *assets*, for it is only a *chose in action*;^(b) so, generally, a right without any estate in possession, reversion and remainder, is not *assets* until it be recovered and reduced into possession.^(c)(2) A power of appointment, however, to raise a sum of money is *assets* for creditors;^(d) but there is this distinction between a power and *absolute property,^(e) that, unless the power be executed, no creditor can be entitled to the money; and it is said, in that case, "father [*28]

(n) *Kellow v. Rowden*, 3 Mod. 257; S. C., 3 Salk. 178; S. C., Show. 244; S. C., Helt, 71; S. C., Carth. 126.

(p) 2 Blackst. 1230.

(o) *Kinaston v. Clark*, 2 Atk. 204.

(r) 3 B. & P. 643.

(q) 1 B. C. C. 240.

(s) *Marwood v. Turner*, 3 P. Wms. 165.

(t) *Devon (Duke) v. Atkins*, 2 P. Wms. 381; *Westfaling v. Westfaling*, 3 Atk. 460, recognised in *Ripley v. Waterworth*, 7 Ves. 477.

(u) *Sheph. Touchst.* 496, citing 6 Co. 47, recognised in *Att.-Gen. v. Dimond*, 1 Cr. & J. 370; S. C., 1 Tyrw. 258.

(v) 2 Ventr. 353.

(z) *Dowdale's case*, 6 Co. 47 a.

(x) 2 Inst. 293.

(y) 1 Jac. & W. 24; S. C., 2 Wils. C. C. 22.

(a) *Brediman's case*, 6 Co. 53 b.

(b) *Br. Assets per Desc.*, pl. 26, citing *Doct. and Stud.*, lib. 1, fol. 76.

(c) *Brediman's case*, sup.

(d) *George v. Milbanke*, 9 Ves. 190.

(e) *Holmes v. Coghill*, 7 Ves. 290.

(1) By the act of 1834, § 9, unless limited to the heirs, they pass to creditors, in Pennsylvania. As to other States, see 4 Kent, 27; *Aerston v. Gage*, 9 Mass. 395.

(2) *S. V. Janett v. Tomlinson*, 3 W. & S. 114.

than supplying a defect in the execution of a power, the Court has never gone" in favour of creditors. (f) (1)

39. An equity of redemption of a mortgage in fee is *assets* in equity, though not at law ; (g) and an equity of redemption of a mortgage for years of an estate in fee is *assets* to pay debts by simple contract ; (h) so, a debt by a decree in equity, though but a personal demand, will bind the heir or devisee having *assets* ; (i) on the other hand, if an executor, in right of his testator, recover damages for any breach of covenant or contract, although it sounds in the realty as for not assuring lands, &c., yet, if it be broken in the testator's lifetime, it shall be *assets* in the hands of the executor. (k)

40. Chattels real are regularly personal *assets* ; so a leasehold estate for years in Ireland is personal *assets* in England, and may be sold here by the executor ; (l) but as to term for years, it has been decided in more than one case, that such a term being a trust-term is not *assets* in equity ; (m) and the distinction taken is, that a term vested in trustees is not *assets* to pay debts ; otherwise, if the term be in the party himself, and the inheritance in trustees ; (n) although a dictum to the contrary of this distinction is reported in *Ratcliff v. Grave* ; (o) but in the S. C., 1 Vern. 196, no mention is made of this point.

[*29] *II. Fund for the Payment of Debts.

41. Under this head may be considered, 1. The distinction between legal and equitable *assets* ; 2. How far personalty is the fund primarily liable ; 3. The order in which real property is applicable for the payment of debts ; 4. Marshalling *assets*.

1. Distinction between Legal and Equitable Assets.

42. *Assets* which are liable to debts and legacies by the course of law are called legal *assets*, but such as are liable only by the help of a court of equity are called equitable *assets*. (2)

(f) Per Sir W. Grant, Ib.

(g) *Sawley v. Gower*, 2 Vern. 61.

(h) *Coleman v. Winch*, 1 P. Wms. 775.

(i) *Comer v. Browne*, 1 Ridgw. P. C. 139.

(k) Off. of Exec. 65.

(l) *Bligh v. Lord Darnley*, 2 P. Wms. 622 ; and see *Gardiner v. Fell*, 1 Jac. & Walk. 22 ; S. C., 2 Wils. C. C. 22.

(m) *Tiffin v. Tiffin*, 1 Vern. 2 ; S. P., *Dowse v. Percival*, Id. 104.

(n) *Thurxton v. Att.-Gen.*, Id. 341.

(o) 2 Chan. Cq. 152.

(1) Such powers are declared assets, and can be exercised by Chancery in New York. 4 Kent, Com. 341.

(2) The distinction between legal and equitable assets exists in New York. *Moses v. Murgatroyd*, 1 J. C. R. 130 ; in Kentucky, *Grider v. Payne*, 9 Dana, 190 ; and Virginia, *Buckhouse v. Patton*, 6 Pet. 168 ; and probably wherever the administration of law and equity are in distinct tribunals. In Pennsylvania, there is no distinction. In *re John Sperry*, 1 Ash. 351 ; but the liens given by law, existing at the time of the death continue and are first paid. *Girard v. McDermott*, 5 S. & R. 128. *Fryhoffer v. Busby*, 17 Id. 122. As in equity, *Codwise v. Gelston*, 10 John. 522.

Legal *assets* are administered according to the rules of priority which have obtained for the payment of debts ; as, first, Crown debts ; next, debts which, by particular statutes, are to be preferred before others, as, money owing for the postage of letters under the Postage Acts, and money to be received by the overseers of the poor under the 17 Geo. 2, c. 38, or by the officer of Friendly Societies, under the 4 & 5 W. 4, c. 40.(p) After these follow debts of record, as judgments [entered according to 2 & 3 Vict. c. 11,(q)] recognizances, then debts on special contract, as for rent, or on mortgages, bonds, covenants, and other like specialities ; and lastly, debts on simple contract. See further on this subject, Bac. Abr. Executors and Administrators (H.) ; 2 Wms. Exec. 1297 *et seq.* ; Ram on Assets, 353 *et seq.*

In a court of equity all debts are equal, whether by judgment, bond, or simple contract, and equitable *assets* will be applied in satisfaction of the creditors *pari passu* ;(r) but when a court of equity administers legal *assets*, it does so *in the due course of administration, allowing the different creditors to enjoy the right of priority they are entitled to at law.(s) [*30]

As to what has been deemed equitable assets in distinction from legal *assets* depends, as it appears, either upon the intention of the testator, or upon the nature of his interest in the property.(t) Upon the principle of law, that whatever came to the hands of a person in the character of executor, or by reason of his executorship, should be *assets* in his hands,(u) the generality of the old cases determined that money arising by sale of lands devised to, or subjected to the power of, executors to sell for the payment of debts and legacies, should be legal *assets* in their hands, although they could not be charged with the value of the lands before sale.(x) In some, however, of the old cases, where a party was supposed to take in the double capacity of trustee and executor, the *assets* were held to be equitable *assets*.(y) and that too, though the devise were not to the executor expressly upon trust or as a trustee, provided there be enough in the will to convert the executor into a trustee, as if the devise be to him and his heirs.(z)

In *Freemoult v. Dedire*.(a) it was holden, that if an estate descended to the heir, charged with debts, it was legal *assets* ; but this decision has been expressly overruled *in *Bailey v. Ekins*.(b) recognising *Hargrave v. Tindall*.(c) *Batson v. Lindegreen*.(d) *Burt v. Thomas*, cited 7 Ves. [*31] 323 ; and it makes no difference whether the descent be broken or not ;(e) and though in *Batson v. Lindegreen*.(f) where the devise was to the heir

(p) See Dig. P. ii. iii. tit. Friendly Societies, Poor.

(q) See Dig. P. iii. tit. Judgments.

(r) Sir C. Cox's Creditors, 3 P. Wms. 341.

(s) *Wilson v. Fielding*, 2 Vern. 764 ; *Clay v. Willis*, 1 B. & C. 371.

(t) 2 Fonbl. Eq. Pr. 401, n. (f).

(u) *Dethick v. Caravan*, 1 Roll. Abr. 920, pl. 6 ; *Berwell v. Corrant*, Hard. 405 ; *Alexander v. Gresham*, 1 Lev. 224.

(x) *Girling v. Lee*, 1 Vern. 63 ; *Hawker v. Buckland*, 2 Vern. 106 ; *Greaves v. Powell*, 243 ; *Cutterbulk v. Smith*, Prec. Chan. 127 ; *Anon.*, 2 Vern. 405 ; *Bickham v. Freeman*, Prec. Chan. 136 ; *Walker v. Meager*, 2 P. Wms. 416 ; *Lord Masham v. Harding*, Bunb. 339 ; *Blatch v. Wilder*, 2 Atk. 420.

(y) *Hickson v. Witham*, Cas. temp. Finch, 196 ; S. C., Freem. 305 ; S. C., nom. *Hixon v. Wytham*, 1 Chan. Ca. 248 ; *Anon.*, 2 Vern. 133 ; *Challis v. Casborn*, Prec. Chan. 408 ; *Chambers v. Harvest*, Mos. 123 ; *Hall v. Kendall*, Id. 323 ; *Prowse v. Abingdon*, 1 Atk. 484 ; *Lewin v. Oakley*, 2 Atk. 50.

(z) *Silk v. Prime*, 1 B. C. C. 138, n. ; *Newton v. Bennett*, Id. 135 ; *Barker v. Boucher*, Id. 140.

(a) 7 Ves. 319.

(c) 1 B. C. C. 136, n.

(d) 1 P. Wms. 429.

(e) *Bailey v. Ekins*, sup.

(f) Sup.

in trust to pay the debts, the heir was held to take by his better title, yet he was by the devise made a trustee, *Bailey v. Ekins.*(g)

43. Where the interest of the party is purely equitable, it has been held that the *assets* should be deemed equitable, unless it came within the Statute of Fraudulent Devises,(h) therefore where a mere trust estate descended upon an heir, it would be considered as legal and not equitable, because the statute gave the specialty creditor his remedy at law against the heir; as if there was a mortgage for years, leaving the reversion in fee in the mortgagor, that would be legal *assets*, because the bond creditor might have judgment against the heir of the obligor, and a *cesset executio* till the reversion came into possession, *sed secus* where it was a mortgage of the whole inheritance, because, in that case, the creditor could have no remedy at law, and if he brought an action against the heir the latter might plead *riens per descent.*(i) In support of this decision, so far as regards a chattel mortgage, it has been held that chattels, whether real or personal, mortgaged or pledged by the testator, and redeemed by the executor, should be *assets* at law in the hands of the executor, for so much as they were worth beyond the sum paid for their redemption;(k) it has, however, been held in other cases, than the equity of redemption of a term for *years is equitable and not legal *assets*;(l) [*32] and it is also said in *Wentworth's Office of an Executor*, that where the redemption of the executor is after the day of payment, equity only and not law can make any part of the value *assets* in his hands; these conflicting decisions may therefore be reconciled, if in the cases first cited the testator did not survive the day of redemption.(m) As to mortgages in fee a distinction is taken in *Sharpe v. Scarborough* (Earl),(n) between bond creditors and judgment creditors, the equity of redemption being in the debtor in the former case, but in the latter case the judgment creditor has the right to redeem, and therefore the equity of redemption is in that case not equitable but legal *assets*.

2. How far the Personal Estate is the Primary Fund.

44. As a rule the personal estate is the primary fund, which must be resorted to for the payment of debts of every description; but to this rule there are several exceptions—in the case of bonds, and other specialties generally, in the case of mortgages, and in the case of devises.

45. As regards debts by bond and other specialties generally, where the ancestor has bound himself and his heirs, the creditor may in that case sue

(g) Sup.

(h) 3 & 4 W. & M. c. 14, amended by 11 Geo. 4 & 1 W. 4, c. 47. See Dig. P. ii. tit. Courts (Equity.)

(i) Plunket v. Penson, 2 Atk. 290.

(k) *Hawkins v. Laws*, 1 Leon. 155; *Harcourt v. Wrenham*, Moor. 858; S. C., nom. *Harwood v. Wrayman*, 1 Roll. Rep. 56; 1 Roll. Abr. 920; 1 Brownl. 76; *Alexander v. Lady Gresham*, 1 Leon. 224. See also Mr. Cox's note, 3 P. Wms. 342.

(l) *The Creditors of Sir Charles Cox*, 3 P. Wms. 342; *Hartwell v. Chitters*, Ambl. 308. both recognised in *Clay v. Willis*, 1 B. & C. 372, which last is also recognised in *Baker v. May*, 9 B. & C. 493.

(m) See 2 Wms. Exec. 1320, 3rd ed.

(n) 4 Ves. 541.

either the heir or the executor at his election ;(o)(1) and it is no plea in an action against the heir that the executor or administrator has *assets* ;(p) so, the creditor may sue the same person being both heir and executor ;(q) but if the heir or executor pay the whole or part, and afterwards the other be sued, there shall be relief in *audita querela* ;(q) so, if the heir pay his ancestor's *debts to the value of the land descended, he shall hold the [*33] land discharged from the other debts of the ancestor ;(r) but he cannot claim to retain a certain sum, for money laid out in repairing the tenements descended ;(s) so, a man may make an equitable as well as a legal charge on his estate, and equity will maintain it against his heir ;(t) so, where the heir, being likewise administrator, and having real *assets per descent*, discharged a bond debt, in which he was bound, which he insisted was out of the personal estate, the Court of Chancery would not admit of this construction, to the defeating of the simple contract creditors.(u) On the other hand, if an heir discharges the bond debt of his ancestor, and the executor has *assets*, he shall reimburse the heir thereout ;(x)(2) and this extends not only to the *hæres natus* or heir-at-law, but also to the *hæres factus* or the devisee.(y)

46. As a rule, if a man mortgages lands, and covenants to pay the money, and dies, the personal estate of the mortgagor shall, in favour of the heir, be applied to exonerate the mortgage,(z)(3) although the personal estate has been

(o) Br. Assets per Desc. 33.

(p) Quarles v. Capell, 2 Dy. 204, b.; Davy v. Pepys, Plowd. 439; Davies v. Churchman, 3 Lev. 189; Galton v. Hancock, 2 Atk. 426.

(q) Haight v. Langham, 3 Lev. 304.

(r) Buckley v. Nightingale, 1 Str. 665; S. C., Ca. temp. Talbot, 109.

(s) Shtetelworth v. Neville, 1 T. R. 454.

(t) Wigg v. Wigg, 1 Atk. 382.

(u) Neave v. Alderton, 1 Eq. Abr. 144.

(x) Armitage v. Metcalf, 1 Chan. Ca. 74; Anon., 1 Chan. Ca. 5.

(y) Gower v. Mead, Prec. Chan. 2; S. C. nom. Meade v. Hide, 2 Vern. 128. See also Pockley v. Pockley, 1 Vern. 36; Cutler v. Coxeter, 2 Vern. 302; Hawes v. Warner, Id. 477; French v. Chichester, Id. 568; Lutkins v. Leigh, Ca. temp. Talbot, 53; Rider v. Wager, 2 P. Wms. 335, in which the personal estate was applied to exonerate the real in favour either of the heir or the devisee, whether general or particular.

(z) Cope v. Cope, 2 Salk. 449.

(1) In Pennsylvania, all lands being assets and subjected to a lien for all the debts of a decedent, the course is to proceed against the personal representative, which might, before the act of 1797, be done at any time after the death of the ancestor,—by that act the proceedings must be commenced and prosecuted within seven years—now reduced by the act of 1834 to five years, in order to charge the land; unless this be done, the heir or devisee is equally discharged with a purchaser. Bailey v. Bowman, 6 W. & S. 118. Upon this judgment, the land could be levied on and sold without notice to the heir, until the act of 1834, § 31, provided a remedy; under this it has been held that after a judgment against the personal representatives, where the real estate is intended to be levied on, the heirs must be summoned by sci. fa., in which they are at liberty to contest the original debt. Murphy's Appeal, 8 W. & S. 165. Atherton v. id., Dec. T. 1846, S. C. Penna. That lands are assets for payment of debts generally in all the States of the Union, is assumed by Kent., 4 Com. 421.

(2) The same rule prevails in Pennsylvania. In re Keysey, 9 S. & R. 72-3; and in Virginia, Haydon v. Good, 4 H. & M. 469.

(3) The heir shall be discharged of a mortgage out of the personal assets. Dandridge v. Minge, 4 Randol. 397. Gibson v. McCormick, 10 Gill & John. 107. In re Keysey, 9 S. & R. 72-3; unless the estate be insolvent, Gibson v. Crehore, 5 Pick. 150; but the rule has been changed in New York by statute. Mollan v. Griffith, 3 Paige, 404.

devised; (a) but such exoneration will not be allowed to the prejudice of any creditor, (b) or any legatee, except a residuary legatee. (c)

[*34] 47. *Every loan creates a debt from the borrower, whether there be a bond or covenant for payment, or not, (d) but in all these cases, the debt being considered as the personal debt of the borrower, the charge on the real estate is merely collateral; on the other hand, where the charge is on the real estate principally, although there be a personal collateral security, the rule is otherwise, therefore a covenant in a settlement to charge land for the payment of portions, or a jointure and the like, although such a covenant creates a debt, yet it is not a personal debt, being an auxiliary security only, and the land the principal security. (e) (1)

48. The land is also not exonerated unless the debt be the original debt of the party, therefore where a grandfather mortgages, and the lands descend to his son, and his son dies, having a personal estate and a son, the son's personal estate shall not go in aid of the mortgage; (f) and the like, if a man buys an estate subject to a mortgage, the land remains the proper fund for the discharge thereof, (f) although there is a covenant to pay the mortgage-money. (g)

[*35] 49. In a devise, the personal estate was held, in the *earlier cases, not exempt from the payment of debts and legacies by anything short of express words. (h) (2) This strict rule was, however, departed from, and then it was held, that the want of such words might be supplied by "plain implication" or "manifest intention," or, as it has been more expressly

(a) *Howel v. Price*, 1 P. Wms. 291. See also *Pockley v. Pockley*, 1 Vern. 36; *King v. King*, 3 P. Wms. 360; *Galton v. Hancock*, 2 Atk. 436; *Robinson v. Gee*, 1 Vez. 25; *Belvidere (Earl) v. Rochfort*, 6 B. P. C. 520; *Phillips v. Phillips*, 2 B. C. C. 273.

(b) *Bartholemew v. May*, 1 Atk. 487.

(c) *O'Neal v. Mead*, 1 P. Wms. 693, recognised in *Halliwell v. Tanner*, 1 Russ. & My. 633. See also *Davis v. Gardiner*, 2 P. Wms. 190; *Rider v. Wager*, Id. 335; *Wythe v. Henniker*, 2 My. & K. 635.

(d) *Balsh v. Highham*, 2 P. Wms. 454; *King v. King*, 3 P. Wms. 358.

(e) *Graves v. Hicks*, 6 Sim. 398; confirming *Coventry (Lady) v. Coventry (Lord)*, 2 P. Wms. 222; *Edwards v. Feeman*, Id. 435; *Wilson v. Darlington (Lord)*, Id. 664, n.; *Lanoy v. Athol (Duke)*, 2 Atk. 244. See also *Lechmere v. Charlton*, 15 Ves. 193; *Ex parte Digby*, Jac. 235; S. C., 1 Jac. & W. 640.

(f) *Cope v. Cope*, 2 Salk. 449.

(g) *Bagot v. Oughton*, 1 P. Wms. 347. See also *Evelyn v. Evelyn*, 2 P. Wms. 659; *Lewis v. Nangle*, Id. 664, n.; *Perkins v. Bayntum*, Id.; *Shafto v. Shafto*, Id.; *Bassett v. Percival*, Id.; *Lewis v. Newnham*, 1 Vez. 51; *Lacam v. Mertins*, Id. 312; *Robinson v. Gee*, Id.; *Parsons v. Freeman*, Anbl. 115; *Lawson v. Hudson*, 1 B. C. C. 58; *Tankerville (Earl) v. Fawcett*, 2 B. C. C. 57; *Tweddell v. Tweddell*, Id. 101, 152; *Billinghurst v. Walker*, Id. 604, where the same principle is laid down; and in some of these cases it was held, that even an original mortgage made by the person to whom land descended, or was devised, would not operate to make the personal estate liable where the mortgage was made for the purpose of paying off debts or legacies of the ancestor or testator. 2 P. Wms. 664, n.; *Tankerville v. Fawcett*, sup. But on this point see *Barham v. Thanet (Earl)*, 3 M. & K. 607. A party may, however, by an act of his own, which unequivocally denotes his intention so to do, make the original debt his own. (*Lawson v. Hudson*, sup.; *Billinghurst v. Walker*, sup.; *Hamilton v. Worley*, 4 B. C. C. 199; S. C., 2 Ves. jun. 62.)

(h) *Dolman v. Smith*, Prec. Chan. 458; *Fereyes v. Robertson*, Bunb. 302.

(1) *Cumberland v. Codrington*, 3 J. C. R. 229. In re *Keysey*, 9 S. & R. 72.

(2) Express words necessary. *Walker's Estate*, 3 Raw. 237. *Rogers v. Rogers*, 1 Paige, 183. *Howe v. Brewer*, 3 Gill & John. 153.

said, "irresistible conclusion," or, as it was afterwards modified, "by such a conclusion as would satisfy a judge." In the following cases the personal estate has been held not exempt:—Cutler v. Coxeter,⁽ⁱ⁾ French v. Chichester,^(k) Dolman v. Smith,^(l) Hazlewood v. Pope,^(m) Inchiquin v. French,⁽ⁿ⁾ Samwell v. Wake,^(o) Ancaster (Duke) v. Mayer,^(p) Astley v. Tankerville (Earl),^(q) Gray v. Minnethorpe,^(r) Brummel v. Prothero,^(s) Tait v. Northwich,^(t) Hartley v. Hurle,^(u) Bridges v. Phillips,^(v) Watson v. Brickwood,^(x) McClelland v. Shaw,^(y) Aldridge v. Wallscourt (Lord),^(z) Tower v. Rous,^(a) Bootle v. Blundell,^(b) Gittins v. Steele,^(c) Rhodes v. Rudge,^(d) Bickham v. Crutwell.^(e) In the following cases the personal estate has been considered exonerated:—Wainwright v. Bendlowes,^(f) Bamfield v. Wyndham,^(g) Adams v. Meyrick,^(h) Stapleton v. Colville,⁽ⁱ⁾ Phippe v. Annesley,^(k) Bicknell v. Page,^(l) Walker v. Jackson,^(m) Philips v. Nicholas,⁽ⁿ⁾ Holiday v. Bowman,⁽ⁿ⁾ *Anderton v. Cook,^(o) Kynaston v. Kynaston,^(o) Glebe v. Glebe,^(o) Webb v. Jones,^(p) Williams v. Llandaff (Bp.),^(q) Burton v. Knowlton,^(r) Gaskill v. Hough,^(s) Hancox v. Abber;^(t) the result of all which cases appears to be, that a general devise of real and personal estate for the payment of debts, will not exempt the personalty, as the primary fund, for it is not sufficient to charge the real estate, it is absolutely necessary in express terms to discharge the personal estate: Bootle v. Blundell,^(u) Bickham v. Crutwell.^(u) At all events, the conclusion of the testator's intention must be drawn from the general context of the will, and evidence *dehors* the will is not admissible.^(x)

3. The Order of paying Debts out of the Real Estate.(1)

50. With respect to the priority of application of real *assets* for the payment of debts, when the personal estate is either exempt or exhausted, the following appears to be the order laid down:—

1. The real estate specifically devised for the payment of debts.^(y)
2. Estates descended.^(z)
3. Real estate specifically devised, subject to a general charge of debts.^(a)

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| (i) 2 Vern. 301. | (k) Id. 569. | (l) Sup. |
| (m) 3 P. Wms. 322. | | (n) Amb. 33; S. C., 1 Wils. 82; 1 Cox. 1. |
| (o) 1 B. C. C. 144. | (p) Id. 451. | (q) 3 B. C. C. 545; S. C. 1 Cox. 82. |
| (r) 3 Ves. 103. | (s) Id. 111. | (t) 4 Ves. 816. (u) 5 Ves. 540. |
| (v) 6 Ves. 567. | (x) 9 Ves. 447. | (y) 2 Sch. & Lef. 538. |
| (z) 1 Ball & Bea. 312. | (a) 18 Ves. 132. | (b) 1 Mer. 193; S. C., Coop. 136. |
| (c) 1 Swanst. 28. | (d) 1 Sim. 79. | (e) My. & Cr. 763. |
| (f) 2 Vern. 718. | (g) Prec. Chan. 101. | (h) 1 Eq. Ca. Abr. 271. |
| (i) Forr. 202. | (k) 2 Atk. 57. | (l) Id. 79. |
| (m) 2 Atk. 624; S. C., 1 Wils. 24. | | (n) Cited 1 B. C. C. 145. |
| (o) Cited Id. 456. | (p) Id. 60; S. C., 1 Cox. 245. | (q) 1 Cox. 254. |
| (r) 3 Ves. 107. | (s) Cited lb. | (t) 11 Ves. 179. |
| (x) Andrews v. Emmott, 2 B. C. C. 29; recognised in Standen v. Standen, 2 Ves. jun. 593. | | (u) Sup. |
| (y) Donne v. Lewis, 2 B. C. C. 256, distinguishing Galton v. Hancock, 2 Atk. 424; Powis v. Corbett, 3 Atk. 556. See also Davies v. Topp, cited 2 B. C. C. 259, n. | | |
| (z) Pitt v. Raymond, cited 2 Atk. 434. | | |
| (a) Pitt v. Raymond, sup.; Milnes v. Slater, 8 Ves. 303. | | |

(1) Order in which assets are marshalled. Hays v. Jackson, 6 Mass. 151. Livingston v. Livingston, 3 J. C. R. 148. Livingston v. Newkirk, Id. 319. McCampbell v. McCampbell, 5 Litt. 95.

4. An advowson in fee descended before freehold estates in fee, and leasehold estates *pur autre vie* devised.
5. Estates devised in trust to be sold for the payment of debts, then estates specifically devised and charged with debts, and lastly the estate descended.(b)
6. A descended estate was held liable to pay off the mortgage, with which a devised estate was charged.(c)

[*37]

*4. *Marshalling Assets.*

51. Marshalling *assets* properly includes what has been stated with regard to the order of their application ;(d) but the term is more particularly applied to those cases where one claimant has two funds to resort to, and another claimant has only one, in which cases a court of equity exercises its jurisdiction, in so applying the funds that all the claimants may be satisfied out of the *assets* as far as they will go ;(e)(1) as if there is a debt owing to the queen, equity will order it to be paid out of the real estate, that other creditors may have satisfaction of their debts out of the personal *assets*.(f) The court interposes in two ways, either by turning the person, who has the double security, upon that fund, which is not liable to the other claimants' demand, so as to leave the other fund open ;(g) or, if satisfaction has already been taken out of this fund by the party having the double security, then by decreeing the other party to stand in his place, and draw from the remaining fund as much as has been taken from the first mentioned, therefore where a mortgagor mortgages two estates to one person, and afterwards one only of the estates to a second mortgagee, who had no notice of the first, the Court, in order to relieve the second mortgagee, have directed the first to take his satisfaction out of that estate which is not in mortgage to the second mortgagee ;(h) so, where executors have paid specialty creditors secured on the

(b) *Donne v. Lewis*, sup. See also *Manning v. Spooner*, 3 Ves. 114.

(c) *Galto v. Hancock*, sup.

(d) See supra, § 50.

(e) *Aldrich v. Cooper*, 8 Ves. 388.

(f) *Sagitary v. Hyde*, 1 Vern. 455.

(g) *Poy's case*, 2 Freem. 51 ; *Feverstone v. Seetle*, 3 Salk. 83.

(h) *Lanoy v. Athol (Duke)*, 2 Atk. 446.

(1) This is a principle of equity independent of the forms of administration of justice. *Kyner v. Kyner*, 6 W. 223. *Wardlow v. Gray*, *Dudley Eq. Ca.* 113. *Brinkerhoff v. Marvine*, 5 J. C. R. 324. 1 Story Eq. ss. 493. 633. 637. *Alston v. Munford*, 1 Brock. 279. And it will be exercised by compelling the parties having two funds to seek satisfaction out of that on which another creditor has no lien, as well *inter vivos* as otherwise. *Clowes v. Woods*, 5 J. C. R. 239 ; *Hawley v. Maneius*, 7 J. C. R. 183-4 ; *Gill v. Lyon*, 1 Id. 447 ; *Evertson v. Booth*, 20 J. R. 498 ; this principle may be considered settled in Pennsylvania without reference to the chancery powers of the court, *Harrison v. Wain*, 9 Serg. & R. 320 ; *Nailor v. Stanley*, 10 Serg. & R. 450 ; *Bruner's Appeal*, 7 W. & S. 269 ; *Hasting's case*, 10 Watts, 305 ; but, if there be doubt as to the sufficiency of the fund, the courts will not restrain the right of the party, *Evertson v. Booth*, 20 J. R. 498 ; nor if delay will ensue, *Kyner v. Kyner*, 6 Watts, 226 ; unless the claim be paid or deposited, Id. ; *Brinkerhoff v. Marvine*, 5 J. C. R. 324 ; nor in favour of a volunteer, *Harrison v. Wain*, 9 Serg. & Rawle, 320 ; and if there be more than one debtor, the equities between them govern the court, *Sterling v. Brightbill*, 5 Watts, 229. And it may be done by subrogation to the security of the other, though this will not be done while any part of the debt remains unpaid, *Kyner v. Kyner*, supra. It was however held in *Feedley's Appeal*, Dec. Term, 1846, S. C. Penna., that judgment creditors might claim, in the first instance, out of the personal property, and look for the residue to their liens where the estate was deficient.

real estate out of the personalty, the simple contract creditors have been decreed to have their debts satisfied out of the land.⁽ⁱ⁾

52. But this marshalling must properly be as between the real and personal *assets* of the deceased, and it has been *said that the court has no jurisdiction to marshal the *assets* of a person alive;^(k) yet it [*38] seems, that although the term "marshal" is technically applied only to *assets* of a deceased person, the principle may, in certain cases, be applied to transactions *inter vivos*.^(l)

So, the court cannot extend this relief to creditors further than the nature of the contract will support,^(m) if, therefore, the contract by specialty be such as not to affect the real estate, as a bond not mentioning heir, there is no marshalling, as there are not two funds, and therefore no one is disappointed by the option of the other.⁽ⁿ⁾

53. Marshalling *assets* is admitted in favour of creditors, in favour of legatees, and in favour of the widow's *paraphernalia*.

54. By the common law the simple contract debts of a deceased person were not payable out of his real estate, unless, by his will or otherwise, he made it a fund for the payment of his debts; but it was otherwise with the creditors by specialty, where the heirs were bound. The 3 & 4 W. 4, c. 104, which subjects all real property to the payment of simple contract debts, is confined to such as have died since 29 Aug. 1833, and the 11 G. 4 & 1 W. 4, c. 47,^(o) which prevents a testator from defeating the claims of his specialty creditors, leaves all devises for the payment of debts as they were before, so that the doctrine of marshalling *assets* in favour of creditors remains in full force; accordingly, if there are creditors by specialty, and also creditors by simple contract, and the specialty creditors, instead of resorting to the real *assets* (which independently of the act the latter cannot reach,) proceed against the personal estate, *the court will then marshal the *assets* by permitting the simple contract creditors to stand in the [*39] place of the specialty creditors against the real *assets*, so far as the latter have exhausted the personal estate;^(p) and this applies to an estate devised, as well as to an estate descended;^(q) so, to copyhold as well as freehold estates;^(r) so, creditors by specialty, although volunteers, have been allowed, as against devisees, to stand in the place of mortgagees, who have exhausted the fund provided by the testator for the payment of debts;^(s) so, in case of bankruptcy, it has been held that the principle of marshalling *assets* was applicable;^(t) so, if the vendor of an estate, the contract for which was not com-

(i) Charles v. Andrews, 9 Mod. 151.

(k) Lacam v. Mertins, 1 Vez. 312.

(l) Aldrich v. Cooper, 8 Ves. 389, recognising Lacam v. Mertins, sup. See Sneed v. Culpepper, 2 Eq. Ca. Abr. 225; 7 Vin. Abr. 52.

(m) Lacam v. Mertins, sup.

(n) Aldrich v. Cooper, sup.

(o) See Dig. P. ii. tit. Courts (Equity).

(p) Wilson v. Fielding, 2 Vern. 763.

(q) Galton v. Hancock, 2 Atk. 436; Snelson v. Corbet, 3 Atk. 369; Austen v. Halsey, 6 Ves. 475.

(r) Aldrich v. Cooper, 8 Ves. 382, overruling Robinson v. Tonge, 1 P. Wms. 680, n., Cox's ed., recognised in Bute (Marquis) v. Cunynghame, 2 Russ. 288; Gwynne v. Edwards, cited 2 Russ. 283, n.

(s) Lomas v. Wright, 2 My. & K. 769.

(t) Greenwood v. Taylor, 1 R. & My. 187, questioned in Mason v. Bogg, 2 My. & Cr. 443. And see Rome v. Young, 3 Y. & Coll. 199.

pleted in the lifetime of the testator, who was the purchaser, is afterwards paid his purchase-money out of the personal *assets*, the simple contract creditors of the testator shall stand in the place of the vendor, with respect to his lien on the estate sold, against the devisee of that estate, *(u)* although in *Coppin v. Coppin* *(x)* it was holden that legatees could not stand in the place of the vendor with respect to his equitable lien, and in *Pollexfen v. Moore* *(y)* it was said, in general terms, that this equity did not extend to third persons, being confined to the vendor and vendee; but on this dictum of Lord Hardwicke see *Austen v. Halsey*, *(z)* *Trimmer v. Bayne*, *(a)* *Mackreth v. Symmons*, *(b)* *Headley v. Readhead*. *(c)*

[*40] 55. "Legatees have not so great a claim to this species of *equity as creditors, but nevertheless, in the case of *assets* descended, legatees will be permitted to stand in the place of specialty creditors, who have chosen to resort to the personal estate." *(d)* On the other hand, where the estate does not descend, but is devised, whether to a stranger or to the heir taking as a devisee, and the question is between the legatee and devisee, the *assets* are not marshalled in favour of legatees, whether general *(e)* or specific legatees. *(f)* *(1)*

56. A distinction is also to be taken where a creditor has a lien on the real estate, for if it be a specific lien, as a mortgage, *assets* will be marshalled in favour of legatees, as well where the estate is devised, as where it descends, therefore if the mortgagee exhaust the personal *assets*, a pecuniary legatee shall stand in the place of the mortgagee upon the devised estate. *(g)* But if it be an equitable lien, such as a vendor has on the purchased estate for the purchase-money unpaid, it is now settled, after much discussion, that where the purchased estate has descended, pecuniary legatees have a right to stand in the place of the vendor. *(h)* Where the purchased estate is devised, it is clearly settled, that a pecuniary legatee shall not stand in the place of the vendor upon the devised estate. *(i)*

(u) *Selby v. Selby*, 4 Russ. 336. *(x)* 2 P. Wms. 291; S. C., Sel. Cha. Ca. 28.

(y) 3 Atk. 273. *(z)* 6 Ves. 475.

(a) 9 Ves. 209. *(b)* 15 Ves. 314.

(c) *Coop.* 50; *Cox's n.* 1 to 2 P. Wms. 295; 3 Sugd. V. & P. 205 et seq., 10th ed.

(d) Per Lord Eldon, C., *Aldrich v. Cooper*, 8 Ves. 396. And see *Bowaman v. Reese*, *Prec. Chan.* 578; *Lutkins v. Leigh*, *Cas. temp. Talbot*, 54; *Hanby v. Roberts*, *Ambl.* 128; S. C., *nom. Hamby v. Fisher*, *Dick.* 105, where it was held that the legatees should not take *cum onere*.

(e) *Clifton v. Burt*, 1 P. Wms. 678; *Scott v. Scott*, *Ambl.* 383; S. C., 1 Eden, 458; *Hanby v. Roberts*, *sup.*; *Keeling v. Brown*, 5 Ves. 359; *Aldrich v. Cooper*, *sup.*

(f) *Hazlewood v. Pope*, 3 P. Wms. 324. But see *Long v. Short*, 1 P. Wms. 403, where it was decreed that *assets* should be so far marshalled that the devisee and specific legatee should, upon failure of the personal estate, contribute, each in proportion according to his respective gift, to the payment of the specialty debt. See, also, *Irvin v. Ironmonger*, 2 Russ. & My. 531.

(g) *Lutkins v. Leigh*, *Cas. temp. Talbot*, 53; *Forrester v. Leigh*, *Ambl.* 171.

(h) *Sproule v. Prior*, 8 Sim. 189, overruling *Coppin v. Coppin*, 2 P. Wms. 296. See also the dictum of Lord Hardwicke in *Pollexfen v. Moore*, *ante*, § 54, in respect of creditors.

(i) *Wyth v. Henniker*, 2 My. & K. 635. See also *Selby v. Selby*, *sup.*

57. *In some other cases it has been held, that *assets* shall be marshalled in favour of legatees, as where the real estate is subjected by [*41] the testator to the payment of all his debts, the legatees are allowed to stand in the place of the specialty or simple contract debtor, to the amount of the personalty exhausted by the debts, and to receive their legacies out of the estate devised.(*k*) So, where some legacies are charged on the real estate, and others not, the *assets* will be marshalled in favour of the legatees whose legacies are not so charged.(*l*)

58. A legacy given to charitable uses is void by the 9 Geo. 2, c. 36, if made payable out of real estate,(*m*) or out of the produce of the sale which the testator has directed to be made of the real estate ;(*n*) so, where the legacy is bequeathed out of personalty, and out of the real estate, as an auxiliary fund, it is so far void as it is given out of the realty.(*o*) Formerly, a distinction was taken between a particular legacy and a residuary gift, and *assets* were marshalled in favour of the former ;(*p*) but by a series of cases, it is now settled that there can be no marshalling *assets* in favour of a charitable bequest, as this would be an evasion of the statute.(*q*)(1)

59. A wife's paraphernalia are liable to the debts of the husband, but a court of equity will marshal his *assets* in her favour; and where the personal estate has been exhausted *by specialty creditors, will decree [*42] her to stand in their place, and receive to the value of the paraphernalia out of the real estate descended,(*r*) or out of real estate devised by the husband for the payment of his debts ;(*s*) for a claim of paraphernalia shall not be disappointed by the effect of the option of a creditor having a double fund to resort to in the administration of *assets*.(*t*)(2)

SECTION III.

RECIPROCAL CONVERSION OF ONE INTO THE OTHER.

§ 60. *Rule in Equity.*

(*k*) *Hanby v. Roberts*, sup.; *Foster v. Cook*, 3 B. C. C. 347; *Bradford v. Foley*, Id. 351; and *Webster v. Alsop*, Id. n.

(*l*) *Hanby v. Roberts*, sup.; *Bligh v. Darnley* (Earl), 2 P. Wins. 619; *Bonner v. Bonner*, 13 Ves. 379.

(*m*) *Arnold v. Chapman*, 1 Ves. 108; cited 3 B. & A. 150.

(*n*) *Foster v. Blagden*, Ambl. 704; *Hillyard v. Taylor*, Id. 713.

(*o*) *Attorney-General v. Weymouth* (Lord), Ambl. 20.

(*p*) *Ib.*; and *Attorney-General v. Mountnorris* (Lord), 1 Dick. 379.

(*q*) *Mogg v. Hodges*, 2 Ves. 52; S. C., Cox, 9; *Attorney-General v. Tyndall*, Ambl. 614; S. C., 2 Eden, 207; *Foster v. Blagden*, sup.; *Fory v. Fory*, 1 Cox, 163; *Ridges v. Morrison*, Id. 180; *Attorney-General v. Hurst*, 2 Cox, 364; *Makeham v. Hooper*, 4 B. C. C. 153; *Hobson v. Blackburn*, 1 Keen, 273; *Williams v. Kershaw*, Id. 274, n.

(*r*) *Snelson v. Corbet*, 3 Atk. 369.

(*s*) *Incedon v. Northeote*, Id. 430.

(*t*) *Aldrich v. Cooper*, 8 Ves. 397.

(1) S. P. in *West v. Methodist Church*, 1 Hoff. 203, for the same reason, i. e. a statute of mortmain.

(2) Mass. R. S. ch. 65, s. 4.

I. Conversion of Money into Land.

1. *How the Conversion may be effected.*

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| § 61. Effected in various Ways.
When complete or otherwise.
In the case of a Will. | 61. Not necessary for Money to be actually laid out.
Money may remain in Hand or be put out to Mortgage. |
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2. *Effect of the Conversion.*

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| 62. General Rule.
In case of Dissent.
Exceptions. | 62. On failure of Heirs not to escheat.
63. In case of Purchase.
64. In case of Devise. |
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3. *Right of Election.*

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| 65. By Person who is complete owner.
66. By Persons under Disabilities. | 67. By Tenant in Tail. |
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II. Conversion of Land into Money.

1. *How effected.*

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| 69. By Deed.
By Contract.
Trust by Will. | 69. Partial Conversion.
Devise to Executors. |
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[*43]

*2. *Effect of the Conversion.*

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| 70. As to the Devolution of the Property.
71. In cases of Devises to Executors.
72. Questions between Heir and Next of Kin. | 73. Between Heir and Residuary Legatee.
74. Between Representatives.
75. Quality of Property resulting.
76. Time of the Conversion, Effect of. |
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3. *Election.*

77. Where devised in Trust to be sold.

III. Conversion in cases of Infants, Lunatics, and Partners.

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| 78. Rule as to Infants' Estates.
Lunatics' Estates. | 78. — Partner's Estates. |
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§ 60. It is a rule in equity, that what has once been agreed or directed to be done, ought to be done, and what ought to be done, shall be considered as really done.(u)(1) According to this rule, therefore, it is that money stipulated to be converted into land, shall be considered as land; and on the other hand, land stipulated to be converted into money is considered as money. This subject, therefore, branches itself into two heads, conversion of money into land, and land into money, which, although having many

(u) 1 Bl. 129; Walker v. Denne, 2 Ves. Jun. 183.

(1) Peter v. Beverley, 10 Pct. 563. Craigie v. Leslie, 3 Wheat. 578. Burr v. Sim, 1 Whart. 262.

points in common, cannot be set forth clearly but by considering them distinctly; to which may be added, as a third head, conversion either way, in cases of infants, lunatics, and partners.

1. Conversion of Money into Land.

This is to be considered, 1. As to how the conversion is effected, and when deemed complete; 2. Effect of the conversion; 3. Right of election.

*1. *How the Conversion is effected.*

[*44]

61. Money may be converted into land in different ways, declaring the intention of the parties, as by way of contract, *(x)* by marriage articles, *(y)* and by will, *(z)* Where it is by contract or by a settlement, it must, in order to be complete, be a contract which equity will enforce; therefore, if the terms of the contract cannot be ascertained, *(a)* or there have been fraud, *(b)* or, if there be an option left in either of the parties to complete or recede from the agreement at his discretion, in either of these cases the property will remain unaltered, as if no stipulation had been made; *(c)* but in respect of an option, it is to be observed, that if trustees in a settlement are directed to lay out money in land, upon the request of the parties, this latter part of the provision does not make it optional in them to lay it out or not, in the event of no request being made. *(d)* In the case of a will, that being ambulatory, the conversion is not complete until the testator's death, and until then the money will be deemed personalty, notwithstanding a devise to lay it out in land. *(e)* So, where it is by will, the will must decisively fix upon the money the quality of land; *(f)* and where it is a deed, the deed must do the same. *(f)*

Where the conversion is in other respects complete, it is immaterial whether the money be actually laid out or not, *(g)* unless when the money is in the hands of the person who would have been entitled to the land, *(h)* or the *parties died before the expiration of the time, when according to the covenant, the money ought to have been invested. *(i)* [*45]

So, it is immaterial if the money remain in the hands of the stipulator; *(k)* or if, instead of being laid out, it be put out to mortgage. *(l)* So, where the money is in the hands of trustees for the purpose of being laid out, *(m)* and

(x) Edwards v. Lady Warwick, 2 P. Wms. 171; Fletcher v. Ashburner, 1 B. C. C. 497, recognised in Wheldale v. Partridge, 5 Ves. 396.

(y) Kettleby v. Atwood, 1 Vern. 298; Lancy v. Fairchild, 2 Vern. 101; Thornton v. Hawley, 10 Ves. 130. *(z)* Lechmere v. Carlisle (Lord), 3 P. Wms. 228.

(a) Savage v. Carroll, 1 Ball & Bea. 265.

(b) Philips v. Bucks (Duke), 1 Vern. 227.

(c) Walker v. Denne, 2 Ves. jun. 170, recognised in Wheldale v. Partridge, 5 Ves. 388.

(d) Thornton v. Hawley, 10 Ves. 130.

(e) Beaulekerk (Lord) v. Mead, 2 Atk. 167.

(f) Walker v. Denne, sup.

(g) Lechmere v. Carlisle, 3 P. Wms. 224.

(h) Rashley v. Masters, 1 Ves. jun. 201.

(i) Chichester v. Bickerstaff, 2 Vern. 299, recognised and distinguished in Lechmere v. Carlisle, sup., and Pulteny v. Darlington, 1 B. C. C. 223.

(k) Chaplin v. Horner, 1 P. Wms. 483.

(l) Rashley v. Masters, 3 B. C. C. 99; S. C. 1 Ves. jun. 201.

(m) Thornton v. Hawley, sup.

so where the stipulation is, that the money should be laid out with the consent of the husband and his wife; yet, if one die before consent given, the money will still be bound by the stipulation.(n) So, where there is a covenant to lay out money in land, it makes no difference that the covenant is a voluntary one.(o)

2. *Effect of the Conversion.*

62. As a rule money stipulated to be converted into land, becomes clothed with all the properties of land, but this rule is subject to distinctions arising from different circumstances, particularly whether the conversion has been complete or not, and the like.

One of the principal consequences of money being thus converted, is, that it will descend to the heir of the owner, instead of going, as it otherwise would to the personal representatives.(p)(1) The exceptions to this rule are where the contract was such as could not be enforced in equity,(q) or [*46] the parties have died before the time for completing the *conversion;(r) but it is not necessary, where money is agreed or directed to be laid out in land, that the deed or will should decisively and definitely fix upon the money the quality of land, therefore, where a testator directed money to be laid out in freehold or leasehold land, and the money was not laid out, it was held that the Crown, on failure of heirs, had no equity against the next of kin to have it laid out in real estate in order to claim it by escheat.(s)

63. If the owner of money, directed to be laid out in land, die before the proper conveyances are perfected, the contract must notwithstanding be completed.(t) So, money stipulated to be laid out in land was not deemed personal *assets* for the payment of debts before the 3 & 4 W. 4, c. 104.(u) So, if money thus circumstanced happen to be invested in mortgage, and the mortgagee die, and the money be repaid, it must be paid to the heir and not to the executors of the mortgagee.(u) So, too, a husband will be tenant by the curtesy of money agreed to be invested in land, and therefore entitled to receive the dividends or interest during his life,(x) but a woman is not in the like case entitled to dower.(x)

64. Money articulated to be laid out in land will pass in a devise under the

(n) *Symons v. Rutter*, 2 Vern. 227.

(o) *Edwards v. Warwick (Lady)*, sup.

(p) *Cunningham v. Moody*, 1 P. Wms. 176; *Simonds v. Rutter*, 2 Vern. 227; S. C., Prec. Chan. 23; *Lancy v. Fairchild*, 2 Vern. 101; *Edwards v. Warwick (Lady)*, 2 P. Wms. 171. See also *Kettleby v. Atwood*, 1 Vern. 228; *Linguen v. Souray*, Prec. Chan. 400; S. C., nom. *Lingen v. Sowray*, 1 P. Wms. 172; *Gilb. 325*; 10 Mod. 39. 523.

(q) *Phillips v. Bucks (Duke)*, 1 Vern. 227; *Walker v. Denne*, 2 Ves. jun. 170; *Savage v. Carrill*, 1 Ball & Bea. 265.

(r) *Chichester v. Bickerstaff*, 2 Vern. 295. And see *supra*, § 61.

(s) *Walker v. Denne*, 2 Ves. jun. 170. (t) *Pembroke v. Baden*, *Gilb. Chan. Rep.* 115.

(u) *Baden v. Pembroke (Earl)*, 2 Vern. 52; *Lawrence v. Beverley*, 2 Keb. 841, cited 2 Vern. 55.

(x) *Sweetapple v. Binden*, 2 Vern. 536; *Otway v. Hudson*, Id. 553; *Cunningham v. Moody*, 1 Vez. 176.

(1) *Peter v. Beverly*, 10 Pct. 563.

general words, "lands, tenements, and hereditaments;"(y) and although a fine could not have been levied if money were so circumstanced, yet, where a feme covert entitled to such money came into court, and was separately examined, analogous to the form of a fine at law, the court would decree it to her.(z)

*3. Right of Election.

[*47]

65. Where money is directed to be laid out in land, of which a person would be complete owner, if the investment were made, the court will in general allow the party to take the money instead of the land, provided he express an unequivocal intention so to do;(a) and it seems that slight circumstances are sufficient to indicate such intention, and therefore bequeathing it by a will calculated to pass personal property only, was held to be sufficient indication,(b) or describing it as "so much money directed to be laid out in land,"(c) or calling in the money and placing it out on other securities, which would carry it to the executors,(d) or giving the trustees a discharge for the money as "so much money;"(e) but a parol declaration has been deemed sufficient evidence of such election.(f)

66. An infant is incapable of electing:(g)(1) therefore, if an infant became so entitled, and died an infant, the money would, as land, descend to his heir, and not pass under a bequest of personalty in his will, (which he was capable of making before the late Wills Act, 7 W. 4 & 1 V. c. 26.) A *feme covert* before the 3 & 4 W. 4, c. 74, abolishing Fines and Recoveries, could not obtain money, articted to be laid out in land, in any other manner than by consenting in open court to take it as personal property.(h)

67. Before the 39 & 40 G. 3, c. 56, repealed by 7 G. 4, c. 45, and both by the 3 & 4 W. 4, c. 74, s. 70, if the party being adult, could, by fine levied, acquire the entire interest in the lands when settled, (as tenant in tail with *immediate remainder to himself in fee,) the court would let [*48] him take the money, if he should so elect; but otherwise, if a recovery were necessary, as in the case of tenant in tail, with remainder over.(i) By the first of these statutes the court was authorised to order such money to be paid to the person who, as tenant in tail, could have barred the remainder by a recovery. As to the provisions in the last of these acts, see

(y) *Lingen v. Sowray*, 1 P. Wms. 172; *Guidot v. Guidot*, 3 Atk. 254; *Rashley v. Masters*, 1 Ves. jun. 201. (z) *Cunningham v. Moody*, sup.

(a) *Lingen v. Sowray*, sup.; *Benson v. Benson*, 1 P. Wms. 130; *Edwards v. Warwick* (Countess), 2 P. Wms. 175; *Rashley v. Masters*, 1 Ves. jun. 204.

(b) 1 B. C. C. 237; *Ambl.* 220.

(c) *Fulham v. Jones*, 3 P. Wms. 221; *Cross v. Addenbroke*, 3 Atk. 254. See also *Rashley v. Masters*, sup.

(d) *Lingen v. Sowray*, sup.

(e) *Chaplin v. Horner*, 1 P. Wms. 483; *Pulteney v. Darlington* (Earl.) 1 B. C. C. 224.

(f) *Bradish v. Gee*, *Ambl.* 22.

(g) *Sealy v. Jago*, 1 P. Wms. 389.

(h) See supra, § 64.

(i) *Short v. Wood*, 1 P. Wms. 471; *Edwards v. Warwick* (Lady,) sup.; *Oldham v. Hughes*, 2 Atk. 453; *Trafford v. Boehm*, 3 Atk. 447; *Cunningham v. Moody*, 1 Ves. 176.

(1) *Robertson v. Stephens*, 1 Ired. 251. *Burr v. Sim*, 1 Wh. 265.

Prec. in Conv. Append. No. X., 3rd ed.; and Dig. P. ii. tit. Fines and Recoveries. As to the conversion of money in cases of infancy, see post, § 78.

II. Conversion of Land into Money.

68. The conversion of land into money may also be considered under the same three heads as before mentioned. (k)

1. How effected.

69. This conversion is effected in three ways: First, by deed, as where a person conveys his land to trustees for the payment of his debts, or otherwise; (l) Secondly, by contract, as where a vendor contracts to sell his estate; (1) in which case, although the vendor dies before the conveyance, the property will be deemed converted from the time of the contract; (m) Thirdly a trust to sell real estate may be created by will, and may cause a conversion, either for a particular purpose only, as to pay debts or legacies, or both; (n) (2) and sometimes the trust is to sell for general purposes, which has been termed a conversion "out and out." (o) (3) Very frequently, lands are devised [*49] to executors *to sell; and a distinction has been taken as to when they take an interest or have only a power. A devise of the lands to executors to sell is said to pass the interest in the land; but a devise "that executors shall sell," or "that the lands should be sold by the executors," is said to give them but a power; a nice distinction, which has caused some discussion. (p)

2. Effect of the Conversion.

70. When the conversion of land into money has been completed, the money is clothed with all the properties of personality; therefore, where the will operated as a conversion of the real estate, the shares of persons, who were dead, devolved on their personal representatives. (q) (4) But many

(k) See ante, § 60.

(l) *Hewitt v. Wright*, 1 B. C. C. 86.

(m) *Ripley v. Waterworth*, 7 Ves. 437.

(n) *Dixon v. Dawson*, 2 Sim. & Stu. 327.

(o) See *Polley v. Scymour*, 2 You. & Col. 708.

(p) See 1 Inst. 113, a., and Hargrave's note thereon; 1 Sugd. on Powers, 133, 6th ed.; 1 Powell on Devises, 243, by Jarman.

(q) *Grievson v. Kirsopp*, 2 Keen, 653.

(1) *Helfenstein v. Waggoner*, 13 S. & R. 307; but not by an agreement with the tenant in common to effect a sale of both interests. *Id.*

(2) *Wright v. Methodist Ch.*, 1 Hoff. C. R. 219. Where it is not absolute but for particular purpose, surplus is treated as land. *North v. Valk*, *Dudley*, Eq. Rep. 212—16. *Burr v. Sim*, 1 Wht. 262.

(3) *Proctor v. Frebee*, 1 Ired. 143, or a direction to pay over the residue. *Burr v. Sims*, 1 Wht. 252. Or if blended with personality, and treated as a common fund. *Id.* Nor will a mere direction to settle a surplus as the land was devised, impress it with the character of land in the hands of the legatee. *Wharton v. Shaw*, 3 W. & S. 126.

(4) A husband would take as administrator to his wife. *Reed v. Buckley*, 5 W. & S. 517. And the court consider it done for the purpose of deciding all the estates taken and

questions have arisen, as to whether the conversion was complete or otherwise, and also as to the time when the conversion has taken effect.

71. Where lands are conveyed or devised to trustees for general purposes, that is, where the conversion, as before mentioned, is "out and out," and it appears clearly to have been the intention of the testator to impress on it the character of personal estate to all intents and purposes, the mere appointment of an executor will be sufficient to carry the property to him.^(r)

Where the conversion is directed to be made for particular purposes, as the payment of debts and legacies, and the objects of the trust have been satisfied, or have failed, so much of it as has not been applied in satisfaction of the trusts, will result to the grantor in the case of a conveyance,^(s) or to the heir, or the residuary legatee, &c., as a resulting trust under a will; in respect of which, however, many questions have arisen as to the intentions of the testator, *whether they were to convert the property wholly, [*50] or in part only. These questions have arisen between the heir and [*50] next of kin, between the heir and the residuary legatee, or between the representatives of these parties.

72. The cases as between the heir and the next of kin seem to turn upon the point, whether the testator meant to confine the conversion to the particular purpose named or mentioned in the will, or whether the produce of the real estate should be taken as personalty, whether such purposes take effect or not; for unless the testator sufficiently declared his intention, that in all cases, and to all purposes, it should be converted, so much thereof as was not effectually disposed of would result to the heir.^(t) (1) The case of *Ogle v. Cook*,^(u) seems to be the only one where the decision was in favour of the next of kin and against the heir; and that decision rested on the expressed intention of the testator. As a rule, it has been laid down, and rather strictly adhered to, that where it is a measuring east between an executor and an heir, the heir shall have the preference:^(v) for an heir shall not be disinherited, unless by express words or necessary implication;^(x) and it seems now to be settled, that unless the next of kin is made a specific donee, he never can stand in competition with the heir.

73. As between the heir and the residuary legatee the rule has been somewhat relaxed in favour of the latter.^(y) *and in a subsequent case it has been held as settled that if an estate is devised, charged [*51]

(r) *Berry v. Usher*, 11 Ves. 91.

(s) *Hewitt v. Wright*, sup.

(t) *Randall v. Bookey*, Prec. Chan. 162; *Emblyn v. Freeman*, Ib. 540; *City of London v. Garway*, 2 Vern. 571; *Cruse v. Barley*, 3 P. Wms. 29; *Stonehouse v. Evelyn*, Ib. 252; *Digby v. Legard*, cited in Mr. Cox's note to *Cruse v. Barley*, sup.; *Arnold v. Chapman*, 1 Ves. 108; *Acceoid v. Smithson*, 1 B. C. C. 593; *Robinson v. Taylor*, 2 Ib. 589; *Spink v. Lewis*, 3 Ib. 355; *Chitty v. Parker*, 4 B. C. C. 411; S. C., 2 Ves. jun. 271; *Wilson v. Major*, 11 Ves. 205; *Hill v. Cock*, 1 Ves. & B. 173; *Dixon v. Dawson*, 2 Sim. & St. 327.

(u) Cited 1 B. C. C. 502.

(v) *Lingen v. Sowray*, 1 P. Wms. 172.

(x) *Gascoigne v. Barker*, 3 Atk. 823; *Amphlett v. Parke*, 2 My. & K. 73.

(y) *Mallabar v. Mallabar*, Ca. temp. Talb. 79; *Daroure v. Motteux*, 1 Vez. 320.

the validity of the bequests. *Gott v. Cook*, 7 Paig. 534. *Wharton v. Shaw*, 3 W. & S. 124.

(1) ante, 48, n. 1.

with legacies that fail, the devisee or residuary legatee and not the heir should have the benefit, (z) on the authority of which cases it was held in *Amphlett v. Parke*, (a) that where the terms of the will afforded the inference that it was the testator's intention that the produce of his estate should have all the properties of personality the legatees should have it to the exclusion of the heir, but this decision was reversed on appeal. (b)

74. The third class of cases is between the representatives of persons entitled under a will, and the rule is that such persons shall take money as land or land as money, according as the person, whose representatives they are, would have taken it, had the title accrued in their lifetime. (c)

75. Another question connected with this subject is whether the property so resulting shall be considered as land or money, in the hands of the heir. In one case where a testator directed his personal estate to be converted into real, for several purposes, some of which failed, it was held that the heir was entitled to take the residue, after satisfying the purposes which could take effect, not as personality impressed with the character of realty. (d) In cases of converting land into money, where the question has more frequently arisen, it has been expressly held, where the trust was created by a conveyance, that the surplus after satisfying the purposes of the trust should result to the grantor as personality and go to his executors. (e) So, where a man [*52] contracts to sell his land and dies before the conveyance, *the heir shall convey the land, and the money shall go to the executor. (f)

Where the trust has been created by a will the rule appears to be, that where there is a partial failure only of the purpose to which the produce of the sale is directed to be applied, the heir takes the benefit of such partial failure as personal estate; but if there be a total failure of the purposes, the deviser's intention as to a sale is to be considered as revoked by the events which have happened, and the heir takes the land as real estate. (g) Where, however, a discretion was vested in trustees to convert realty into personality in favour of next of kin, and the trustees did not exercise that discretion, the Court exercised it for them so far as to declare who were the parties that were entitled to take, namely the testator's next of kin, but that such part of the fund as consisted of real estate should be distributed as realty, so as to descend to their heir-at-law. (h)

76. As to the time of the conversion, to be complete, it must take place in the lifetime of the owner. (1) but if he contract to sell his land, that will be a

(z) *Kennell v. Abbott*, 4 Ves. 892.

(a) 1 Sim. 275; S. C., 4 Russ. 75.

(b) S. C., 2 R. & My. 221.

(c) *Scudamore v. Scudamore*, Prec. Chan. 543; *Fletcher v. Ashburner*, 1 B. C. C. 497; *Flanagan v. Flanagan*, cited *Ib.* 50).

(d) *Hareford v. Ravenhill*, 1 Beav. 481.

(e) *Hewitt v. Wright*, 1 B. C. C. 86.

(f) *Baden v. Pembroke, Lady*, 2 Vern. 52; S. C., 3 Chan. Rep. 217.

(g) *Smith v. Claxton*, 4 Midd. 148; see also *Wright v. Wright*, 16 Ves. 188; *Dixon v. Dawson*, 2 Sim. & St. 340; *Jessopp v. Watson*, 1 My. & K. 665.

(h) *Cole v. Wade*, 16 Ves. 27; recognised in *Walter v. Maunde*, 19 Ves. 424.

(1) Where the conversion is positively directed at a particular time, it is considered as having taken place at the death of the testator. *Reading v. Blackwell*, 1 Baldw. 173

complete conversion, although the conveyance has not been perfected until after his death, and the purchase money will go to the executor.⁽ⁱ⁾(1) So, where a tenant has an option to purchase, the rents, until the option is made, go to the heir, but from that time the conversion takes place, and the purchase money shall go to the personal representative.^(k) So, where the tenant elected to purchase after the death of the lessor, held that the election had relation to the time of the contract, and the property was converted from that time into personalty.^(l) So, upon sale of estates [* 53] under a bankruptcy, the property paying twenty shillings in the pound, and the bankrupt being dead, it has been held, that so much of the real property as was converted in the lifetime of the bankrupt should be deemed personal, and so much as was converted after his death should be considered real estate;^(m) so, upon a mortgage with a power of sale, reserving the residue to the mortgagor, his executors and administrators, if the sale takes place in the lifetime of the mortgagor, the surplus is personal estate, if after his death, it is real estate.⁽ⁿ⁾

3. Election.

77. Where land is devised in trust to be sold, the parties may elect to take it as land.^(o) but they must do some act to determine their election, or the land will be deemed to be converted;^(o)(2) so, where lands are devised to be sold, and the money divided among several persons, none of them can elect to take land instead of money, if one desires a sale;^(p)(3) so there can be no election where it would be to the prejudice of third parties.^(q)(4)

III. Conversion in Cases of Infants, Lunatics, and Partners.

78. As a rule the nature of either an infant's or lunatic's property must not be changed so as to convert them, neither by a trustee, nor by the court

(i) *Baden v. Pembroke*, (Lady,) sup.

(k) *Townley v. Bidwell*, 14 Ves. 591.

(l) *Lawes v. Bennett*, 1 Cox, 167.

(m) *Bank v. Scott*, 5 Madd. 493.

(n) *Wright v. Rose*, 2 Sim. & St. 323.

(o) *Kirkman v. Miles*, 13 Ves. 383.

(p) *Deeth v. Hals*, 2 Molloy, 317; and see *Walker v. Denne*, 2 Ves. 170.

(q) *Davers v. Folkes*, 1 Eq. Cas. Abr. 396.

Allison v. Wilson, 13 S. & R. 332; *Simpson v. Kelso*, 8 W. 247; but if directed on an event, it will not be so considered until that happen. *Wright v. Methodist Church*, 1 Hoff 219; 10 Pet. 563; *Boshart v. Evans*, 5 Wht. 551; when it happens it becomes money. *Wharton v. Shaw*, 13 S. & R. 332.

(1) But an authority by private act works no conversion. *Tilghman's Estate*, 5 Wht. 41. *Gest v. Flock*, 1 Green. Ch. R. 115.

(2) A mortgage of, by the person entitled to the money, is an election, and it cannot be disturbed. *Gest v. Flock*, 1 Green. Ch. R. 115; or a devise as a house, *Burr v. Sim*, 1 Wht. 265; or a conveyance by feme covert, who had the separate use under the will; *Smith v. Starr*, 3 Wht. 62. It is the election, not the right to make it, which impresses the property with its former character. *Craige v. Leslie*, 3 Wheat. 378-86.

(3) When made, it becomes a new acquisition for the purpose of descent. *Barr v. Sim*, 1 Wht. 266. *Simpson v. Kelso*, 8 W. 252.

(4) The Court will consider the conversion as made at the death of the testator, or within a year, so as not to interfere with the rights of third persons. *Van Vechten v. id.* 8 Paige, 124.

itself, which is only a trustee ;(r) but the reason why an infant's personal estate, turned into real, was still considered personal, was on *account [*54] of the different ages at which (before the 7 W. 4 & 1 V. c. 26, preventing infants from making any wills,) an infant might dispose of his personal and his real estate, and not in favour to one representative more than another ;(s)(1) but there were cases where the court deviated from that rule, where it appeared that it would be for the benefit of the party.(t)

In the case of lunatics the first care is to provide for the maintenance of the lunatic, but it is a rule never to change his property, nor to alter the succession of it,(u)(2) and a committee is not authorised to purchase real estate with savings, and so alter its nature, for land so purchased will be deemed personal ;(v) but the Court have allowed part of the personal estate to be laid out in improving the real estate, if the next of kin, who had an interest, did not shew any reason against it.(x)

The committee may, it seems, exercise the same power over a lunatic's estate, with regard to cutting timber, as the lunatic himself might have done ;(y) but there is no equity for the heir, as against the personal representatives, to have the surplus money, arising from the sale of timber, felled by the order of the Court, restored after the death of the lunatic ;(z) and the case is the same, where the produce of the timber has been applied in redemption.(a) As to when the estate of the lunatic shall be deemed real or personal, under 11 G. 4 & W. 4, c. 65, see Dig. p. i. tit. Lunatics, (*Renewal, Surplus.*)

It is said in *Philips v. Philips*,(b) that all property, whether real or personal, whatever may be its nature, purchased *with partnership capital [*55] for the purposes of the partnership trade, will have, to every intent, the quality of personal estate, and the same was laid down as the law in *Fereday v. Wightwick*,(c) recognising *Townsend v. Devaynes*.(d)(3)

(r) *Ex parte Phillips*, 19 Ves. 122 ; *Ware v. Polhill*, 11 Ves. 278.

(s) *Pierson v. Shore*, 1 Atk. 480.

(t) *Winchelsea (Earl) v. Norcliffe*, 1 Vern. 437 ; *Ashburton v. Ashburton*, 6 Ves. 6 ; *Webb v. Shaftesbury (Lord)*, 6 Madd. 100.

(u) *Ex parte Annandale (Lady)*, Ambl. § 81.

(v) *Audley v. Audley*, 2 Vern. 192 ; S. C., 2 Freem. 114.

(x) *Sergeson v. Sealey*, 2 Atk. 413.

(y) *Ex parte Ludlow*, 2 Atk. 407.

(z) *Ex parte Bromfield*, 3 B. C. C. 510 ; S. C., 1 Ves. jun. 453 ; *Oxendon v. Compton (Lord)*, 4 B. C. C. 231 ; S. C., 2 Ves. jun. 69.

(a) *Ex parte Phillips*, 19 Ves. 118 ; and see *Ware v. Polhill*, sup.

(b) 1 My. & K. 663.

(c) 1 R. & My. 45.

(d) 1 Mont. Law of Part. Append. 97. See also *Broom v. Broom*, 3 My. & K. 443.

(1) The Courts in this country adopt this rule, looking to the benefit of the infant, not to the person in succession, though in most cases they are the same, whether the property be realty or personalty. *Mills v. Denis*, 3 J. C. R. 370. *Stapleton v. Vanderherf*, 3 Dess. 21 ; and this power in Pennsylvania is vested in the Orphans' Court by the Act 1832, § 31. iii.

(2) The interest of those in succession are not regarded, and the timber will be sold or conversion ordered as will most benefit the lunatic. In *re Salisbury*, 3 J. C. R. 347.

(3) The right only exists in equity—at law the title passes to the partners as tenants in common, and by their several conveyances. *Sigourney v. Mann*, 7 Conn. 11. *Delaney v. Hutchinson*, 2 Rand. 183. And there must be superior equity to induce the Court to interfere. *Anderson v. Wilkins*, 1 Brock. 463.

If purchased with partnership funds and for partnership purposes, the Court will, as between creditors of the firm and separate creditors, consider it personal property, and the joint creditors as having a priority. *Sigourney v. Mann*, sup. *Forde v. Herron*, 4 Munt.

So, in *Morris v. Kearsley*, real estate held for partnership purposes was declared to be in the nature of personal estate ;(e) but in earlier cases it had been decided that the user and enjoyment of freehold property for partnership purposes, and an agreement between the co-partners to hold the property in trust for the co-partnership, would not alter the descendible character of the real estate, where the agreement was not so express as to amount to a conversion of the property into personalty.(f) In *Ripley v. Waterworth* the real property was held to be converted, because, on the construction of the deed, it appeared that the parties had contracted that when the partnership determined the property should be converted to all intents and purposes ;(g) so, if the property held by partners is not used for partnership purposes it has been held not to be converted.(h) As to shares in companies, see *infra*, § 83.

SECTION IV.

[*56]

MISCELLANEOUS POINTS OF DISTINCTION BETWEEN REALTY AND PERSONALTY.

I. The Rights and Liabilities of the Heir.

1. *Rights of the Heir.*

§ 80. As to Conditions and covenants.

| § 80. Taking advantage of Contracts.

(e) 2 Y. & Col. 139.

(f) *Thompson v. Dixon*, 3 B. C. C. 198; and that authority was followed in *Bell v. Phyn*, 7 Ves. 453; and see *Smith v. Smith*, 5 Ves. 189; *Balmain v. Shore*, 9 Ves. 590; *Stuart v. Bute* (Marquis), 11 Ves. 665; *Crawshay v. Maule*, 1 Swanst. 521.

(g) 7 Ves. 425.

(h) *Randall v. Randall*, 7 Sim. 271; *Cookson v. Cookson*, 8 Sim. 529.

316. *Richardson v. Wyatt*, 2 Dess. 482; or, if there be a conversion by express agreement—as, that it is part of the capital, ut sup. *Green v. Green*, 1 Ham., Ohio, 543. *Coles v. Willet*, 15 John. 161. *McDermott v. Laurence*, 7 S. & R. 438.

But there must be notice to affect third persons on the face of the deeds. *Hall v. Henrie*, 2 Watts, 145. *Forde v. Herron*, ut sup. And the mere fact of a purchase with partnership funds, will not affect the right as acquired by the conveyance, for the partners have a right to apply the property in that way. *Id.* *Goodwin v. Richardson*, 11 Mass. 469. Nor if merely for the purpose of carrying on the trade. *Edgar v. Donnelly*, 2 Munf. 387. The fact that the conveyance was not to the parties as partners, was relied on in *McDermott v. Laurence* and *Forde v. Herron*, as indicating an intention that the property was not to be converted.

That the firm may follow moneys laid out in land by one partner, for the doctrine of resulting use, is well settled. *Edgar v. Donnelly* ut sup. *Kister v. Kister*, 2 W. 323, in the syllabus of which “not” is printed for “or.” For they are in the same situation as others, and that their creditors may do the same, not conflicting with the rules which protect purchasers without notice, would seem to follow. *Hale v. Henrie*, being a case of a purchase. *Leisenring v. Blake*, 5 W. 307. As the English doctrine is unnecessary here, as all lands are assets, and as entire justice between all parties may be done by this rule, so far as it does not conflict with other rights equally sacred, it will perhaps be found to be the best calculated to reconcile the cases, to hold the title to the land in all cases passes in default of express agreement as land, subject to the right of partners or their creditors to follow the purchase money into the land on the same terms and restrictions as in cases of trusts, so far as it may be necessary to do justice between the partners.

2. *Liabilities of the Heir.*

81. Conditions and Covenants.

| 81. Contracts or Agreements.

II. *Matters affecting the Wife and Others.*

82. Title of the Heir, when not to be defeated.

| 82. Contribution, when Heir liable to.

III. *What deemed Interests in Land or Otherwise.*83. What Rateable.
Pipes laid down.
Shares in Waterworks.| 83. Contracts giving an Interest in Land.
Occupation of Land.IV. *Statutes relating to Property.*84. Land Tax.
Deaths of Cestui que Vies.
Qualification by Estate.| 84. Settlement by Estate.
Statutes of Limitations.
Criminal Offences affecting the Realty

79. The principal matters remaining to be considered under this head relating to the distinction between realty and personalty are, 1. The rights and liabilities of the heir in respect of the acts and contracts of the ancestor; 2. Matters affecting the heir, executor, and other persons; 3. What deemed interests in land or otherwise; 4. Statutes relating to real or personal property.

[*57] *I. *The Rights and Liabilities of the Heir.*1. *Rights of the Heir.*

80. Conditions and covenants real, or such as are annexed to estates, shall descend to the heir, and he, as a rule, alone shall take advantage of them; (*k*) for conditions can only be reserved to the feoffor, donor or lessor, and their heirs, and not to any stranger, (*l*) and the condition descends to the heir by implication of law without express words; (*m*) so, if a man seised in right of his wife, makes a feoffment in fee upon condition, and dies, after the condition is broken, the heir of the husband shall enter, for the title of entry by force of the condition, which was created upon the feoffment, and reserved to the feoffor and his heirs, descended. (*n*)

So, where covenants run with the land as a covenant to repair, although the lessee covenants with the lessor, his executors, administrators, and assigns, yet his heir may have an action on this covenant; (*o*) (1) but where the

(*k*) Underwood v. Swain, 1 Chan. Rep. 161; Marks v. Marks, Pre. Chan. 486; Whaley v. Cox, 2 Eq. Ca. Abr. 549; Wigg v. Wigg, 1 Atk. 382; Hodgson v. Rawson, 1 Vez. 47.

(*l*) Litt. s. 447; 1 Inst. 214.

(*m*) 1 Roll. Abr. 470.

(*n*) Whittingham's case, 8 Co. 43; 1 Inst. 202.

(*o*) Lougher v. Williams, 2 Lev. 92; S. C., 2 Danv. 235.

(1) Real covenants run with the land, descend to heirs and vest in assignees, 4 Kent

breach takes place in the lifetime of the covenantee, the action shall be brought by the executor; (*p*)(1) so, where the covenant is in gross the rule does not apply, as where the covenant is with J. S. to make a conveyance to one and his heirs, his heir shall not have an action, *sed secus* if the covenant is in another conveyance and goes with the estate. (*q*) So, a covenant with a man and his heirs to convey land is good, because the covenant is real, but an obligation to a man and his heirs is bad, because the covenant is personal. (*q*)

The heir may also take advantage of the contracts of the *ancestor, therefore, where A.'s father contracted with a carpenter to pay him [*58] £1,000 to build a house on his estate and A. dies before the contract is put into execution, the heir may compel the building of the house, and the executor to pay the money. (*r*) So, where a tenant had an option to make a purchase of the land within a given time, and the option was not made until after his death, nevertheless his heir was entitled to have the land and the executor bound to pay the money; (*s*)(2) but the contract must be such as the ancestor was bound to perform, therefore, where a contract for the purchase of an estate was not completed in the ancestor's lifetime, from the terms of it not being ascertained, held, that the heir was not entitled to have the personal estate applied in payment of the purchase-money; (*t*) and as to what was deemed part performance of the contract see *Wills v. Stradling*. (*u*) So, where A. covenants for himself and his heirs that he will purchase lands and settle the same on himself for life, remainder to his wife for life, and remainder to his first and other sons in tail, remainder to himself in fee, equity will compel the executor to lay out the money, although the heir is both debtor and creditor. (*x*) See further as to a conversion of money into land, &c., ante. § 60, et seq.

2. *Liabilities of the Heir.*

81. So, the heir is in like manner bound by the act of the ancestor, and

(*p*) *Lucy v. Lexington*, 2 Lev. 26; S. C., 1 Vent. 175; 2 Keb. 831; 2 Dan. 86; 1 And. 55.

(*q*) *Palm*, 558.

(*r*) *Lechmere v. Carlisle* (Earl), 3 P. Wms. 222.

(*s*) *Douglas v. Whitrong*, cited 16 Ves. 253.

(*t*) *Savage v. Carroll*, 1 Ball & Bea. 265, 282. See also *Buckmaster v. Harrop*, 13 Ves. 456.

(*u*) 3 Ves. 378.

(*x*) *Lechmere v. Carlisle* (Earl), 3 P. Wms. 223.

Com. 471, and the cases cited in note (*b*), or the assignee by a sheriff's sale. *Whitehill v. Gotwalt*, post.

On p. 492, he says, the general covenant that a man will warrant and defend the title, is a personal covenant. The contrary has been held to be the law in *Whitehill v. Gotwalt*, 3 Penna. Rep. 313-31, where the covenant was, that he would warrant against all persons claiming under him, &c., the usual covenant in that state, and it was then said, if the eviction was after the conveyance, he alone could sue.

(1) Chancellor Kent says, 4 Com. 471-2, this rule is sustained by the current of English and American cases, but that it has been held in *Kingdon v. Nottle*, 1 Mael. & Sel. 355, 4 ib. 53, that a covenant of seisin being broken by the want of seisin at the time of conveyance, does not pass to the assignee. He considers this incorrect, for it is a continued covenant, though the S. P. was decided in *Backus v. McCoy*, 3 Ohio Rep. 211. Contra, *Mitchell v. Warner*, 5 Conn. Rep. 497.

(2) It has been ruled in Pennsylvania, that the administrator, by virtue of his duty to collect assets for payment of debts, succeeds to the right of the ancestor to rescind a con-

therefore will be bound by all such conditions and covenants as run with the land, whether such were annexed to the estate by the original feoffor, or grantor, or by his immediate ancestor; (z) and although an infant, he is equally bound, therefore, if by tenure or prescription certain lands are bound [*59] to the repair of bridges and *highways, and the same come to an infant by descent or purchase, he shall be obliged to repair in the same manner as if he were of full age; (a) so, where a man covenants to convey lands, his heirs shall be bound, although not named; (b) and so, even where it was only an agreement and by parol, yet being in consideration of marriage, the court decreed an execution; (c) and so, an heir is bound to perform his father's covenant where he is benefitted by the contract, though he claims nothing but what was settled on him in strict settlement. (d) So if A. contracts to sell lands, and receives great part of the purchase-money, but dies before the conveyance, the heir shall convey the lands, and the money shall go to the executor; (e) so, if lands are settled on trustees for raising daughters' portions, the heir shall join in the sale, although the legal estate is not in him; (f) but the issue of a tenant in tail is not bound to perform an unexecuted agreement for the sale of an estate, for the heir comes under the statute singly, and not as deriving from the ancestor, who contracted; (g) but as to the power of a tenant in tail to dispose of the estate, see 3 & 4 W. 4, c. 74, Prec. in Conv. tit. Fines and Recoveries, 3rd Ed.; and as to the conversion of land into money, see ante, § 68 et seq.: and as to where a court of equity may compel an infant heir to convey lands for the payment of debts or under the contract of the ancestor, see 11 Geo. 4, & 1 W. 4, cc. 47. 60, Dig. P. ii. tit. Courts (Equity).

[*60] *II. Matters affecting the Heir and Others.

82. The title of an heir is not to be defeated but by some other title certain and unexceptionable; and therefore, where there is proof of the existence of a will, the contents of which do not appear, no conjecture shall be admitted to the prejudice of the heir; (h) so, where there are two wills void for uncertainty, the heir will be let in; (i) so, where there is not a clear intention to pass the real estate, the court will intend an intestacy in favour of the heir; (j) (1) and an heir does not want a clear intention to take by will, though

(z) Whittingham's case, 8 Co. 44; 1 Inst. 233; Hard. 11; Roll Abr. 421.

(a) 2 Inst. 703.

(b) Gell v. Vermuden, 2 Freem. 199.

(c) Sir John Otway's case, cited Ib.

(d) Chetwynd v. Fleetwood, 4 B. P. C. 435.

(e) Baden v. Pembroke (Lady), 2 Vern. 52. 215; S. C., 3 Chan. Rep. 217.

(f) Roll v. Roll, 2 Vern. 99.

(g) Powel v. Powel, Prec. Chan. 278; Weal v. Lower, cited, 2 Vern. 306.

(h) Cowp. 92.

(i) Phipps v. Anglesea (Earl), 5 B. P. C. 45.

(j) Timewell v. Perkins, 2 Atk. 102.

tract for the purchase of land, and may recover back the purchase-money, and that his election will bind the heir. Pennock v. Freeman, 1 Watts, 401.

(1) The same rule prevails in this country, as is shown from the cases deciding that an inheritance must be given expressly or by implication, which does not arise from a mere gift of the land, to pass more than an estate for life. There are instances in which this latter rule has been broken through, but in New York, Maryland and Pennsylvania, a

it is otherwise with regard to a deed; *(k)* yet a voluntary conveyance shall not be helped in equity against an heir; *(l)* but where the devise is effective, it shall lie upon the heir to prove that it has been effectively defeated; *(m)* and where one devised his lands to J. S., paying £1,000 to his heir, and on J. S. making default, the heir entered and recovered, yet the court relieved the devisee on payment of principal, interest and costs; *(n)* when the court relieved the devisee against the entry of the heir, on compensation being given for the breach of condition; so, if an estate is limited to trustees for payment of debts and legacies, and the trustees raise the whole money, but do not apply it according to the trust, the heir shall have the lands discharged, and the legatees must seek their remedy against the trustees. *(o)* See further as to the liability of the heir to the debts of the ancestor, ante, § 31 et seq.

If the ancestor binds himself in a statute, recognizance, &c., the heir is liable not only as terre-tenant, but also as heir, otherwise he could not have his age but as to parol *demurrer see 11 Geo. 4 and 1 W. 4, c. 47, Dig. P. iii. tit. Guardian and Infant, (Infant), and cannot oblige a purchaser, whether for valuable consideration or without, to contribute; *(p)* ⁽¹⁾ but one heir may oblige another to contribute or one coparcener may oblige another to contribute; *(p)* ⁽²⁾ so, an heir shall not sustain the whole burthen of an incumbrance, where he claims under the same settlement with a jointress, but she shall contribute. *(q)*

III. What deemed Interest in Land, or otherwise.

83. The questions as to what are deemed interests in land or otherwise have arisen in a variety of cases relating to rates, water-companies, contracts within the Statute of Frauds, &c.; thus tolls *per se* have been held not rateable as real property, *(r)* unless where connected with some tangible real property, as sluices, engines, or the like. *(s)* See further Dig. P. iii. tit. Poor Rate. So pipes laid in the ground for the conveyance of gas, have been held to come within the denomination of real property; *(t)* and on the same

(k) Lloyd v. Spillett, 2 Atk. 151.

(l) Vane v. Fletcher, 1 P. Wms. 354.

(m) Harwood v. Goodright, Cowp. 87; S. C., 7 B. P. C. 344.

(n) Barnardiston v. Vane, 2 Vern. 366. And see Grimstone v. Bruce (Lord), 2 Vern. 595; S. C., Salk. 156.

(o) Anon., 1 Salk. 153.

(p) Herbert's case, 3 Co. 12.

(q) Carpenter v. Carpenter, 1 Vern. 440.

(r) R. v. Eyre, 12 East, 416.

(s) R. v. Cardington, Cowp. 582.

(t) R. v. Brighton Gas Company, 5 B. & C. 466; S. C. 8 D. & R. 308.

statute has been requisite to give effect to what to common understanding is always the intent of the testator. The cases on the subject will be found collected in 4 Kent Com. 537, c. 68, § v.

(1) The heir succeeding to the rights and obligations of his ancestor, could not compel contribution from those against whom such ancestors have no equity; that a purchaser whose land was subjected to a charge for which his vendor was bound at the time of the sale, can compel satisfaction from him, has been shown ante, 37, n. Cowden's Estate, 1 Barr, 267.

(2) The doctrine governing the case of coparceners, will generally apply in this country where all the children are heirs, whether males or females. Weiser v. Weiser, 5 Watts, 279.

principle, pipes for the conveyance of water have been held to constitute an interest in land,^(u) and the reservoir with the water would all descend to the heir,^(v) and shares in water-companies have been deemed real estates.^(x)(1) unless as is usually the case, provision is made in the Act of Parliament [*62] *for making such shares personalty^(y) and in *Blight v. Brent*, 2 Y. & Coll. 268, recognising *Weekly v. Weekly*, cited 2 Y. & Coll. 281, and distinguishing it from the other cases, it was held, that the shares in the Chelsea Waterworks Company were personalty, although there was no provision in the Act making them so, on the ground that in the other cases before mentioned, the corporation had no power to convert the realty into personalty, but in this case they had the fullest power of managing the property entrusted to them in whatever way they thought best.

Under the Statute of Frauds, contracts for the sale of growing grass have been held to be contracts for the sale of an interest in land;^(z)(2) so, a contract for the sale of growing poles;^(a) and so, at one time a crop of turnips, potatoes, or corn, were held to be interests in the land while growing, but not when they had ceased to grow.^(b)(3) See further, Dig. P. ii. tit. Frauds (Statute.)

In regard to the rateability of land, it is necessary to distinguish between an occupation of the land of another for a partial or temporary purpose, which is a mere privilege or easement, as a license to take stone from a quarry, or make a canal and the like, and the permanent interest in the land which the owner has, the former of which is not rateable, and the latter is, in respect of the value of the land.^(c)(4)

(u) *R. v. Bath (Corporation)*, 14 East, 609.

(v) *Ib.*; recognised in *R. v. Rochdale Waterworks Company*, 1 M. & S. 634; *R. v. Chelsea Waterworks Company*, 5 B. & Ad. 156; S. C., 2 Nev. & Man. 765.

(x) *Drybutter v. Bartholomew*, 2 P. Wms. 127; *Townsend v. Ash*, 336; *Stafford (Lord v. Buckley)*, 2 Ves. 182. And see also *Swaine v. Falconer*, Show. P. C. 207; *Sandys (Lord) v. Sibthorpe*, 2 Dick. 545.

(y) *Drybutter v. Bartholomew*, sup., Ex parte *The Vauxhall Bridge Company*, 1 Gl. & J. 101; *The Lancaster Canal Company*, Mont. & Bl. 94; S. C., 1 D. & C. 420.

(z) *Crosby v. Wadsworth*, 6 East, 602; recognised in *Evans v. Roberts*, 5 B. & C. 832.

(a) *Teal v. Aughty*, 2 B. & B. 99.

(b) *Emmerson v. Heelis*, 2 Taunt. 38.

(c) *R. v. Trent and Mersey Navigation Company*, 4 B. & C. 57; S. C. 4 D. & Ry. 47.

(1) Shares in corporations, even though created for the mere purpose of holding real estate (such as canals, rail roads, &c.,) are generally considered personalty. *Trevor v. Perkins*, 5 Wh. 255: where it was said a provision making the shares, in a particular canal, realty, was anomalous. But in *Welles v. Cowles*, 2 Conn. 567, shares in a turnpike company were considered realty. And see 4 Dane Abr. 670, c. 130, x. art. 4, § 32.

(2) So the privilege of cutting wood in a devise. *Wright v. Barrett*, 13 Pick. 41. And it was thought trespass *quare clausum fregit* would lie for an injury to a right of the herbage, *Rehoboth v. Hunt*, 1 Id. 229. So, in a sale of growing timber. *Putney v. Day*, 6 N. H. 436, and of anything, part of the inheritance, requiring force to separate it therefrom, as stones, gravel, &c. *Bostwick v. Leach*, 3 Day, 484. The same was held of sea weed thrown on the shore. *Emans v. Turnbull*, 2 Johns. R. 322.

(3) *Penhallow v. Dwight*, 7 Mass. 34.

(4) A right to dig ore on a tract of land, conveyed to A. and his heirs, for a valuable consideration, not appurtenant to land, is an incorporeal hereditament, not a license. *Grubb v. Guilford*, 6 Watts, 224—46. The distinction is between an easement, which is a permanent interest in another's land, and a license, which is to do an act or series of acts, without any interest in the land. Per Kent, in 3 Com. 452. So a bridge erected over a public highway, by the license of the legislature, is real estate, the land on which the abutments rested belonging to the owners of the bridge. *Hurst v. Meason*, 4 W. 346.

As to the tenures by which lands are held, the estates which may be had in them, or the title which there may be to them, or the injuries affecting them, real property is so clearly distinguished from personalty, as to render any close comparison between them unnecessary.

*IV. Statutes Relating to Property.

[*63]

84. By the first general Land Tax Act, 38 G. 3, c. 5, and continued Acts, a tax is imposed upon every species of real property, and on some kinds of personalty. See Dig. P. i. tit. Land Tax. This tax, as regards personalty, is continued by the 3 & 4 W. 4, c. 98; but the annual tax on offices and other personal estate is repealed by the 3 & 4 W. 4, c. 12.

By the 6 A. c. 18, provision is made against the fraudulent concealment of the deaths of *cestui que vies*. See Dig. P. i. tit. Estates (Life.)

When an estate is made a qualification for office there is a considerable difference observed between realty and personalty as to the amount, as in the case of commissioners of land-tax, trustees of turnpike roads, commissioners of sewers, justices of the peace, members of Parliament, and formerly there was also a game qualification. See the respective titles, Dig. P. i., ii., iii.

By the 9 G. 1, c. 7, the purchase of land to the amount of 30*l.* gives a right to a settlement in a parish, as by other Acts the renting a tenement or land to the value of 10*l.* gives the same right. See Dig. P. iii. tit. Poor.

By the early Mortmain Acts, corporations were prevented from disposing of their lands, but by subsequent Acts license is given to them to make such disposition for particular purposes, as for redeeming the land-tax, building churches, or providing church-yards, &c., making inclosures, or exchanges and the like, but the 9 G. 2, c. 36, has imposed restrictions on all persons, generally, making gifts of either lands or personal estate to charitable uses. See further, Dig. P. i., ii. tit. Charities, Church, Common; P. iii. Mortmain, where also similar provisions will be found affecting *femes covert*, infants, lunatics, and persons having particular estates.

*The periods within which real and personal property may be recovered by action or otherwise, is now particularly defined by the [*64] 21 J. 1, c. 16, 3 & 4 W. 4, cc. 27. 42, and other Acts, see Dig. P. iii. tit. Limitations. So, as to the stealing goods and chattels, and writings which may serve as evidence of title to real estate, see the Larceny Acts, Dig. P. i. tit. Larceny. And as to the abduction of heiresses, or women generally, for their property, see Dig. P. i. tit. Abduction.

As to advowsons, copyholds, leases, &c., see the respective titles, post, and Dig. P. i., ii., iii., tit. Advowson, Copyholds, Distress, Leases, Landlord and Tenant.

[*65]

*CHAPTER II.

CORPOREAL HEREDITAMENTS.

SECT. I.
§ 86. LAND.

SECT. II.
§ 88. MANORS.

SECT. III.
§ 89. HOUSES.

SECT. IV.
§ 90. CHURCHES.

SECT. V.
§ 93. SUIT AT MILL.

SECT. VI.
§ 94. COMMONS AND WASTE LANDS.

SECT. VII.
§ 96. WOODS AND TREES.

SECT. VIII.
§ 97. FORESTS AND CHASES, &c.

SECT. IX.
§ 98. MINES AND MINERALS.

SECT. X.
§ 102. WAYS.

SECT. XI.
§ 104. WATER.

§ 85. Corporeal hereditaments are as before observed (see ante, s. 2) matters of sense, and include all the different parts of land, in which according to their several uses and natures persons have acquired distinct rights and interests that are recognised in law, and form distinct branches of real property. These may be considered under the following heads:—1. Land; 2. Manors; 3. Houses; 4. Churches; 5. Mills; 6. Commons and Waste Lands; 7. Woods and Trees; 8. Forests, Chases, &c.; 9. Mines; 10. Ways; 11. Water.

What relates to tenures, estates, titles and injuries affecting corporeal hereditaments will be found in the subsequent books.

[*66]

*SECTION I.

LAND.

§ 86. Signification of the word "Land."

I. What passes by the name of Land.

§ 86. In Grants.

86. In Devises.

II. By what names the Soil will pass.

§ 87. Messuage or House.
Cottage.
Wood, &c.
Farm.
Mines, &c.
Fold-course.

87. Park, &c.
Water.
Fishery.
Profits of the Land.
Herbage, &c.

§ 86. Land, even in the limited sense in which it is commonly used, applies to all kinds of grounds, as meadows, pastures, woods, moors, marshes, furze, heath, &c. ; but not to rents and advowsons and such like things ; (a) and in this sense it is taken in a grant of land, but in writs and pleadings it is taken in a restricted sense for arable land only. (b) Of land, therefore, it will be necessary to consider :—1. What passes under the name of land ; 2. By what names the soil will pass.

I. What passes by the name of Land.

By the grant of all lands, do pass arable lands, meadows, woods, moors, waters, marshes, furzes, &c. (c) It includes also castles, houses and other buildings erected thereon, *therefore, if a man grant all his lands in D., his houses there pass. (d) So, if a man let his land, open mines [*67] will pass ; (e) but not such as are not open, (e) unless he let the land with all the mines in it, and there are no open mines. (e) So, if a man grant his land, all the profits within the bowels of the earth will pass ; (f) as mines of tin, lead, iron, coal, &c. ; (f) so, water upon the land, and fish, and a piscary. (f) So, if a man demise the herbage of his woods, although the soil does not pass thereby, yet if he afterwards grant all his land in the tenure or occupation of the lessee, the wood passes. (g) So, by grant of any land in possession, the reversion thereof will pass ; (1) sed secus as to the grant of land in reversion, for the land in possession will not pass. (h) And in such grants respect must be had to the estate of the grantor, therefore if a man seised in fee of some lands, have other lands for life or years only in a parish, and grants all his lands, tenements and hereditaments in this parish, and makes livery of seisin of the lands, whereof he is seised in fee in the name of all the rest, no more will pass than the lands whereof he is seised in fee, for otherwise it would be a forfeiture for those lands ; (i) but wherever no forfeiture would be occasioned, leasehold lands held with, and reputed part of a freehold estate, would pass by the conveyance of the freehold by force of the general words, "all meadows, lands, &c., to the said freehold belonging or appertaining." (k)

In a devise, greater latitude is given to the construction of the words, therefore, where one devises all his freehold houses in A., and has none but leasehold houses there, the leaseholds shall pass ; sed secus in a grant ; (l) and in a devise such a description will be deemed sufficient, by which

(a) 1 Inst. 4 ; Shep. Touchst. 91.

(c) Perk. sect. 114.

(e) Astry v. Ballard, 2 Lev. 185.

(g) 1 Inst. 4, b.

(i) Shep. Touchst. 92.

(l) Day v. Trig, 1 P. Wms. 286. See also Rose v. Bartlet, Cro. Car. 292 ; Davies v. Gibbs, 3 P. Wms. 26 ; Knotsford v. Gardiner, 2 Atk. 450 ; Doe v. Williams, sup. ; Randal v. Riccardson, 1 H. Bl. 26, n. a.

(b) Silly v. Silly, 1 Vent. 260.

(d) 2 Roll. Abr. 57.

(f) 14 H. 8, 1 ; 1 Inst. 4.

(h) Liford's case, 11 Co. 47.

(k) Doe v. Williams, 1 H. Bl. 25.

(1) Grant of all the share and interest, passes estate in possession and reversion. Sowle v. Sowle, 10 Pick. 377.

[*68] *the intent of the deviser may be collected ;(*m*) if therefore, he devises all his real estate, copyhold lands will pass ;(*n*) and money directed to be laid out in land will pass in a devise, by the words "all my lands, tenements and hereditaments whatsoever and wheresoever."(*o*)(1) So, if land be granted to a man, impliedly a way will pass, as where one acre is granted in the midst of twenty, the grantee may pass over the lands of the grantor to his own land without being a trespasser.(*p*)

II. By what names the Soil will pass.

87. By the grant of a messuage or house, the orchard, garden and curtilage occupied therewith, will pass ;(*q*)(2) sed contra as to the garden ;(*r*) and so, an acre or more may pass by the name of a house.(*s*) So, by a devise of a messuage or house, land will pass ;(*t*) but what shall be said to pass by a devise is a question of intention ;(*u*) and unless it clearly appears that the testator meant to extend the word "appurtenances" beyond its technical sense, lands usually occupied with a house will not pass under a devise of a messuage with the appurtenances,(*v*) particularly if the land is at a distance.(*w*)

A cottage is a little house without land, and by that name a little dwelling-house without land will pass ;(*x*) it *was, however, the purpose of [*69] the 31 Eliz. to prevent the practice of building cottages without land, but that statute is now repealed.(*y*)

By a grant of wood it is said that the land passes.(*b*) In *Whilster v. Paslow*(*c*) it was held that by an exception in a lease of "all woods, underwoods, coppices, and hedge-rows," the soil itself is excepted, but by an exception of "all timber trees," no soil is excepted but that in which they grow ; and in *Pincomb v. Thomas*(*d*) a sale of "all saleable underwoods growing" does not pass the soil.(3)

The word "farm" properly signifies a capital or principal messuage, and

(*m*) Dy. 280, b.

(*n*) 2 Eq. Ca. Ab. 234 ; but see *Haslewood v. Pope*, 3 P. Wms. 322. See also *Lane v. Stanhope*, 6 T. R. 345 ; *Doe v. Lucan*, (Earl), 9 East, 448.

(*o*) *Rashley v. Master*, 3 B. C. C. 99.

(*p*) F. N. B. 183 ; *Shep. Touchst.* 96, (N. B.)

(*q*) *Hill v. Grange*, *Plowd.* 170 ; *Carden v. Tuck*, Cro. El. 89 ; S. C., nom. *Chard v. Tuck*, 3 Leon. 14 ; 1 Inst. 5, a, 56, b ; *Bettisworth's case*, 2 Co. 32. See also Br. Feoff. 53.

(*r*) *Keilw.* 57 ; *Moor*, 21, pl. 82. (s) 1 Inst. 5 b.

(*t*) *Doe v. Collins*, 2 T. R. 502 ; *Doe v. Martin*, 2 Bl. 1148.

(*u*) *Gulliver v. Poyntz*, 2 Bl. 726 ; S. C., 3 Wils. 141.

(*v*) *Doe v. Norton*, 1 B. & P. 53 ; *Doe v. Lucan*, (Earl), 9 East, 448. See also 2 Saund. 401, Wms. Ed.

(*w*) *Hearn v. Allen*, Cro. Car. 57 ; S. C., Hutt. 85.

(*x*) *Shep. Touchst.* 91.

(*y*) See Dig. P. i. tit. Cottages.

(*b*) 1 Inst. 4, b ; *Ives and Syme's case*, 5 Co. 11 ; but see *Bro. Grants*, 167.

(*c*) Cro. Jac. 487.

(*d*) Id. 524.

(1) The election, not the right to elect, reconverts property into its original state, after having been converted by devise or contract. *Craig v. Leslie*, 3 Wheat. 556 ; ante, 52, n. 2.

(2) *Homstead. Woodman v. Lane*, 7 N. H. 245.

(3) Ante, 19, n. 1.

a great quantity of demesnes thereto belonging, and by that name houses, lands and tenements might pass ;(e) but in its modern acceptation, it is taken for that which is held by a person standing in the relation of tenant to a landlord ;(g) and the word "farm" in a will is sufficient to pass a leasehold estate, if it appear to have been the testator's intention that it should so pass.(h) So, by the grant of all farms, leases for years may pass.(i)

By the name of mines or minerals of lead, &c. the land itself shall pass in a grant if livery be made, and it might formerly be recovered in an assize ;(k) but see 3 & 4 W. 4, c. 27, abolishing these real actions, Dig. P. iii. tit. Limitations ; and so, by the grant of a fold-course, it is said that lands and tenements may pass.(k)

So, if a man have a forest, park, chase or warren in his own ground, and he grant the same, hereby not only the privilege, but the land itself passes ;(k) but if the ground be another's, or if it be his own, and the grant be only of the game, &c. the soil itself will not pass.(k)

If a man grants *aquam suam* the soil shall not pass,(1) but *the piscary only ;(l) but by the name of a pool or pit the water and land [*70] will both pass.(m)(2) Whether by the grant of a several fishery the land passes is not quite settled.(n) Lord Coke lays it down, that it does not pass ;(o) but others maintain that one having a several fishery must be owner of the soil.(p) In *Partheriche v. Mason*,(q) it was held that where a man has a several fishery, the presumption is that he is owner of the soil. As to the right of fishery, which is an incorporeal hereditaments, see post, § 304.

By a grant of the profits of the soil the land will pass, as, if a man grant all his meadows or all his pastures, the land passes, for what is land but the profits thereof ?(r)(3) But as to what was formerly understood by the vesture of the land, see *Keilw.* 48 ; 4 *Leon.* 43 ; *Palm.* 174 ; *Ow.* 37. On the other hand, if a man grant the herbage of the land, the land itself will not pass ;(4) because the grantee has only a particular right in the land and shall not have the houses, trees, mines and other real things ;(s) so, if a man grants a liberty to dig turves, the land shall not pass.(t)(5)

(e) *Plowd.* 195 ; 1 *Inst.* 5, a. (g) *Lanc v. Stanhope* (Lord), 6 T. R. 353.

(h) *Ib.* ; see also *Doe v. Lucan* (Earl), sup. (i) *Bro. Grants*, 135.

(k) 1 *Inst.* 5, a. (l) 1 *Inst.* 4, b ; *Dav.* 45. (m) 1 *Inst.* 5, a.

(n) *Kinnersley v. Orpe*, 1 *Doug.* 56. (o) 1 *Inst.* 4, b.

(p) *Bro. Tresp.* pl. 426 ; *Smith v. Kemp*, 2 *Salk.* 637 ; *S. C.*, 4 *Mod.* 186 ; *S. C.*, *Carth.* 285. (q) 2 *Chitt.* 658.

(r) 2 *Plowd.* 169 ; 1 *Inst.* 4, a. (s) *Moor*, 355, pl. 483.

(t) *Plowd.* 541 ; *Wilson v. Mackreth*, 3 *Burr.* 1826 ; *Crosby v. Wadsworth*, 6 *East*, 606.

(1) By a grant including a river, an island therein does not pass. *Jackson v. Halstead*, 5 *Cow.* 219.

(2) It was held in *Hart v. Hill*, 1 *Whit.* 124, where the pool was below low water mark, that a devise of a fishing place passed no right to the soil of the adjacent land, but such a right only as was essential to the exercise of the devise ; but here there was no ownership in the soil of the pool.

(3) *Reed v. Reed*, 9 *Mass.* 372. *Stewart v. Kenower*, 7 *W. & S.* 288.

(4) *Rehoboth v. Hunt*, 1 *Pick.* 224. *Clap v. Draper*, 4 *Mass.* 266.

(5) That 100 acres should be left common for the use of the town for building stones, the land does not pass. *Worcester v. Green*, 2 *Pick.* 425.

[*71]

*SECTION II.

MANORS.

§ 88. Definition.
Reputed Manor.
Manor cannot be divided.

§ 88. What passes under the Word.
Advowson.
Lands.

§ 88. A manor is a tract of land originally granted by the king to a person of rank, part of which was given by the grantee to his followers, and the rest he retained under the name of his demesnes, and that which remained uncultivated was called the lord's waste and served for public roads and for common of pasture for the lord and his tenants.

A manor consists of demesnes and services; whenever the demesnes are severed from the manor, or the services become extinct, then the manor itself is destroyed; (u) but although many manors have been thus destroyed, yet they continue to be called manors, and a reputed manor will pass in a conveyance by the word "manor." (x) And it is not necessary to prove a manor to be a continuing manor for all purposes. (y)

Manors were formerly called baronies, and are still called lordships, and each lord or baron was empowered to hold a court called a court-baron, which was an inseparable ingredient of every manor; and if the number of suitors should prove not sufficient to make a jury or homage, that is two tenants at the least, the manor itself is lost. (z)

[*72] *It is a settled rule, that a manor cannot be granted at this day, a manor therefore cannot be divided by the act of the party, for that would be to create a new manor. (a) And although a manor may not be divided by the act of the party, yet it may by act of law, if therefore upon a partition between parceners, parcels of the demesnes and services are allotted to each, each hath a manor, being in by act of law; (b) but otherwise joint-tenants, co-parceners and tenants in common fall within the rule that a manor cannot be divided by act of the party. (b)

Whatever before the Statute of Frauds might pass by livery of seisin, either in deed or in law, might pass without deed; (c) therefore not only the rents and services, parcel of the manor, might with the demesnes, as the principal and more worthy, pass by livery without deed, but all things regardant, appendant and appurtenant to the manor, as incidents or adjuncts to the same, might with the manor, pass without deed. (c) But things which

(u) Finch's case, 6 Co. 64.

(x) Finch's case, sup.; Thinne v. Thinne, 1 Sid. 190; S. C., 1 Lev. 28.

(y) Soane v. Ireland, 10 East, 259. See also Calth. Read, 13; Smith v. Smith, 2 Price, 104; Curzon v. Lomax, 5 Esp. 60; Steel v. Prickett, 2 Stark. 466.

(z) Perk. sect. 670; Co. Cop. s. 31. And see Seriven on Copyholds, and Watkins on Copyholds.

(a) Acton's case, Dy. 288; Murrell v. Smith, 4 Co. 24; S. C., Cro. El. 252; Melwich v. Luter, 4 Co. 266; S. C., Cro. El. 103; Bright v. Porth, Cro. El. 442; Finch's case, sup.; Mabie's case, Winch. 237; Lord North and Lady Dacre, Cary, 25; Brown v. Goldsmith, Moor, 876; S. C., 1 Brownl. 175; S. C., Hob. 108; Wheeler v. Twogood, 1 Leon. 118; Lemon v. Blackwell, Skinn. 191; R. v. Buccleuch (Duchess), 6 Mod. 151; but see Kitch, 7; Harris v. Haies, Cro. El. 19; Morris v. Smith, Cro. El. 39; S. C., Ow. 138; S. C., nom. Marshe and Smith's case, 1 Leon. 26; Denny's case, 2 Leon. 290; Neale v. Jackson, 4 Co. 26, where this rule is qualified.

(b) Marshe and Smith's case, 1 Leon. 26.

(c) 1 Inst. 121, b.

are not parcel of the manor, will not pass by the grant of a manor, and therefore if one have a manor, and after purchase a warren to it, and then grant away the manor, the warren will not pass thereby; and yet if by the union time out of mind they have gotten the reputation of appendancy, perhaps by the grant of the manor, *cum pertinentiis*, these things may pass.(d)

By the grant of a manor also divers towns may pass; so, an honour may pass by this name, and so also a castle and a *hundred, and one manor also, that is parcel of another, may pass by the grant of that [*73] manor, whereof it is parcel. So, on the other hand by the grant of an honour, may pass one or more seignories, manors and divers other lands; and so a castle may contain one or more manors;(e) but by a castle most commonly is signified no more than the house or building and the parcel of ground inclosed, wherein it stands.

By the 17 E. 2, *de Prærogativa Regis* (see Dig. P. ii. tit. Advowson) the Queen's grant of a manor will not grant an advowson appendant, without express mention of it; but where the King granted a manor with all its appurtenances, as fully as the same came to and were possessed by him, an advowson appendant to the manor was held to pass;(f) and the grant of a manor with advowsons, &c. thereunto belonging, was held not to extend to an advowson served in ancient times, though it was appendant three hundred years ago.(g) If a man seised of a manor in D., devises all his lands and hereditaments in D., the manor being an hereditament shall pass;(h) but if he has lands in D., not parcel of the manor, it seems doubtful whether the manor would pass by a devise of "all his lands" there.(h)

SECTION III.

HOUSES.

§ 89. How a House is protected.
In Execution of Process.
What is Burglary.
Statutory Provisions relating to
Houses.
What included in a Message.

§ 89. Outhouses.
Yards and Courts.
Curtilage.
Gardens and Orchards.
Waste.

§ 89. As to what land passes under the name of a house or message. see ante, § 87. A house is so far protected by *law, that in the execution of civil process, the officer cannot justify the breaking open [*74] an outer door or window,(i) but he may break open inner doors.(k) This privilege, however, extends only to the house of the party himself, not to the house of a stranger to which he has fled.(l) So, if an officer is locked in, he may justify breaking out.(m) So, if the party escape, after having

(d) Plowd. 54; 1 Inst. 5, a.

(f) Whistler's case, 10 Co. 63, a.

(h) Hazlewood v. Pope, 3 P. Wms. 322.

(k) Lee v. Gansel, Cowp. 1.

(m) 2 Hawk. P. C., c. 14, s. 11; 1 East, P. C., c. 5, s. 87.

(e) Plowd. 54; 1 Inst. 5, a.

(g) R. v. Durham, (Bp.) Com. 361.

(i) Fost. 319.

(l) 5 Co. 93.

been legally arrested, the officer may, upon fresh suit, break open even the outer door in order to retake him.⁽ⁿ⁾

To constitute a burglary or breaking into a house, it must be the dwelling or regular residence of the owner,^(o) therefore a set of chambers in an inn of court or college is deemed a distinct dwelling-house for this purpose :^(p) so, even a loft, over a stable used as the abode of a coachman, may be burglariously entered ;^(q) but burglary cannot be committed in a tent or booth at a fair. See further 1 Chitt. Burn's Just., 534 et seq. ; also Dig. P. i. tit. Larceny ; and also as to setting fire to houses, Dig. P. i. tit. Malicious Injuries ; as to destroying houses in riots, Dig. P. i., ii., tit. Hundred ; also as to what constitutes keeping house or departing therefrom under the bankrupt laws, Dig. P. i., ii., tit. Bankrupt ; as to the provisions for regulating the building of houses, and the law respecting party-walls, see Dig. P. ii. tit. Building, also the last Building Act, 7 & 8 Vict. c. 84.

A message was formerly thought to include more than a house,^(r) but this is now overruled ;^(s) but any prescriptive claim in respect of a message must be made in respect of an ancient message.^(t)

[*75] *A message or mansion includes not only the dwelling-house but also all outhouses, as barns, stables, cowhouses, and dairyhouses, if they be parcel of the mansion, although they be not under the same roof or lying contiguous to it ;^(u) and the conveyance or demise of a message passes all under the same roof, unless at the date of the instrument, some part had been separated by a petition, and not occupied with the message for many years ;^(v) and so a conveyance of a message " with the appurtenances " will pass fixtures usually removable, unless they be parted therefrom before the execution of the deed.^(x) But by the 7 & 8 G. 4, c. 29, s. 13, no building although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for the purpose of burglary, or for any of the purposes aforesaid, unless there be a communication between such building and dwelling-house, either immediate or by means of a covered and inclosed passage leading from one to the other. The term " outhouse " may be applied to a school-room, separated from the dwelling-house by a narrow passage.^(y) And before the above-mentioned Act it was held applicable to a dairy-house or mill-house, if connected with the dwelling-house.^(z) Outhouses are mentioned in the Larceny Act,^(a) and also in the Vagrant Act, where it is provided that any person found lodging in any barn or outhouse, &c., without giving a satisfactory account of himself, shall be deemed a rogue and vagabond. An open building standing out of the sight of the dwelling-house has been held not to be an outhouse within the Larceny Act ;^(b) so, not a cart-hovel standing in a field away from other buildings ;^(c) so, it seems a mill was not deemed an

(n) *Genner v. Sparkes*, 1 Salk. 79 ; 1 Hale, 459 ; 2 Hawk. sup.

(o) *Fuller's case*, 2 East, P. C. 498.

(p) 1 Hale, 556 ; 1 Hawk. c. 38, s. 11.

(q) *R. v. Turner*, 1 Leach, 305.

(r) *Keilw.* 57.

(s) *Doe v. Collins*, 2 T. R. 498. See § 87.

(t) *Dunstan v. Tresider*, 5 T. R. 2 ; *Stott v. Stott*, 16 East. 343. And see further, post, § 459.

(u) 1 Hale, 558, 559.

(v) 2 Stark. 508.

(x) 2 B. & C. 76. See ante, § 19.

(y) *R. & R. C. C.* 295.

(z) 3 Inst. 67.

(a) See Dig. P. i. tit. Larceny.

(b) *R. v. Ellison*, 1 M. C. C. 336.

(c) *R. v. Parrot*, 6 C. & P. 402.

out-house before that *act.(d) Outhouses are also expressly protected, by the 7 & 8 G. 4, c. 31, from destruction by rioters.(e) [*76]

Yards and courts commonly contiguous to houses, and going with them as appurtenances, are, if inclosed, protected by the above-mentioned Vagrant Act, and in the Highway Act they are also mentioned as places not to be taken for the widening of any highway.(f) If a yard is common to several houses, let to different tenants, the possession thereof belongs to the landlord subject only to a right of way in such tenants.(g) An area, like a yard, is provided for in the Vagrant Act; and stealing from an area is felony under the Larceny Act, but breaking into an area was not burglary at common law.(h) Curtilages are court yards, or back sides or pieces of ground lying near to and included within the same fence as the dwelling-house, which, it seems, may be sufficiently large to allow cattle to be levant and couchant therein, and therefore that a person may prescribe for common appurtenant in respect of a house and a curtilage.(i) As to the claim of an easement to let water flow into the back side of another person's house see *Reynolds v. Clarke*; (k) also post, § 418; and as to nuisances generally, see post, INJURIES TO THINGS REAL.

A garden is parcel of a house and passes with it (l) so, by the grant of a messuage or house, the orchard, garden and curtilage pass without the word "appurtenances."(m) By the Larceny Act stealing any plant, root, &c. growing in any garden, orchard, nursery-ground, hot-house, green-house or conservatory, is a felony if a second offence, and *punishable as larceny. By the Malicious Injuries Act any injury to the extent of [*77] one pound to any tree, sapling or shrub growing in any park, pleasure-ground, garden, orchard or avenue, or in any ground belonging to any dwelling-house, is made felony, and punishable with transportation for seven years. And the destroying or damaging any plant, &c. growing in any garden, &c. (see supra) is made punishable by a forfeiture of 20*l.* or six calendar months' imprisonment. By the Highway and Turnpike Acts provisions are made in favour of gardens and orchards as in the case of yards.(n)

A tenant is not at liberty to plough up strawberry beds in a garden being an injury to the inheritance, although such things may be appraised and paid for as between outgoing and incoming tenants.(o) but he may remove trees growing in a nursery-ground in the necessary course of his trade; see further, post, WASTE.

(d) 2 East, P. C. 1020: 1 Leach, 49.

(e) See Dig. i., ii. tit. Hundred.

(f) See Dig. P. ii. tit. Highways.

(g) *Herbert v. Thomas*, 1 Gale, 53.

(h) *R. v. Davis*, R. & R. C. C. 322.

(i) *Sholes v. Hargreaves*, 5 T. R. 46. And see *Emerton v. Selby*, 2 Ld. Raym. 1015; S. C., 1 Salk. 169.

(k) 2 Lord Raym. 1339.

(l) *Br. Feoffin. de Terre*, 53; *Bettisworth's case*, 2 Co. 32.

(m) *Plowd.* 171; 1 Inst. 5, b; 56, a. b. See ante, § 57.

(n) See Dig. P. iii. tit. Highways.

(o) *Wetherell v. Howells*, 1 Camp. 227.

SECTION IV.

CHURCHES.

- | | |
|---|---|
| § 90. What comprehended under the word
"Church."
— "Chancel."
Property in Pews.
Must be appurtenant to a House.
Statutory provisions as to Churches. | § 91. Interest in the Glebe.
Tithes in respect of the Glebe.
Emblements.
92. Freehold in the Churchyard.
Right of Burial.
Trees in the Churchyard. |
|---|---|

§ 90. The word "church," with the rights thereto belonging, include the glebe, parsonage, and tithes; the right of presentation to which, called an advowson, is an incorporeal hereditament.^(p)

[*78] *A church is otherwise called a benefice, which is either a rectory or vicarage. By the grant of a rectory or parsonage will pass the house, the glebe, the tithes and offerings belonging to it; and by the grant of a vicarage will pass as much as belongs to it, as the vicarage-house, &c.^(q)

After presentation, the freehold is in the parson, and he may maintain ejectment for recovery of the same.^(r) So, no one may preach in his pulpit without his consent.^(s) So, if the walls, windows, or doors, or any part of the freehold of the church, is injured by any person, the incumbent of the rectory may have his action for the damages;^(t) but while the church is in his hands, he has it under certain regulations and restrictions.^(u) Therefore he cannot alienate any part of the chancel so as to deprive his successors of their power over it.^(x) So, in the case of Cowen and Pym,^(y) it was held, that albeit the freehold of the church be in the parson, yet if the lord of a manor or any other has a house in a parish, and he and all those whose estates he has in the mansion, has had a seat in an aisle of the church for him and his family only, and has repaired it at his proper charges, the seat therein shall be deemed his frank tenement; and so in Francis and Ley,^(z) the repairing an aisle in a church and the using to sit therein was held to make this proper and peculiar to his house, and he could not be displaced; but the constant sitting and burying there without using to repair it, gains no peculiar property.^(a)

There can be no property in pews; the ordinary may grant a pew to a particular person while he resides in the parish, or there may be a prescription by which a faculty is presumed.^(b) Non-parishioners, whether extra-parochial or *residing in another parish, have no such rights; so soon as an occupier of a pew ceases to be a parishioner, his right

(p) See post, § 117; also Dig. P. i., ii., iii. tit. Advowson, Benefice, Presentation.
 (q) Br. Grant, 86; Shep. Touchst. 93. (r) Doe v. Fletcher, 8 B. & C. 25.
 (s) Thurton v. Reignolds, 12 Mod. 433. (t) Wats. Cl. L. c. 33.
 (u) Clifford v. Wicks, 1 B. & A. 498. (x) Ib. 507. (y) 3 Inst. 202.
 (z) 3 Cro. Jac. 366. (a) 2 Co. 105.
 (b) Barrow v. Kien, 1 Sid. 361; Hawkins v. Coleman, 3 Phill. 16. See also Blake v. Elsborne, 3 Hagg. 733; Fuller v. Lane, 2 Add. 425; Walter v. Sumner, 1 Consist. 317; Pettman v. Bridger, 1 Phill. 323; Hawkins v. Compiegno, 3 Phill. 11.

to the pew ceases ;(c) although it should seem, that even a non-parishioner may claim an aisle or a chancel by prescription,(d) but he must have such right as appurtenant to a house, although the house be out of the parish.(e) If a pew is rightly appurtenant, the occupancy of it must pass with the house, and individuals cannot, by contract between themselves, defeat the general right of the parish,(f) a prescriptive right cannot be exercised by a transfer to a non-parishioner,(f) but a right to a faculty pew may be apportioned, if the house be divided into two,(g) and where the prescription is interrupted a jury is not bound to presume a faculty from long undisturbed possession ;(h) and reparation from time to time is necessary to be pleaded and proved in order to make out a prescriptive right to a pew ;(i) but lining and putting new cushions is however not a sufficient reparation.(k) The parson or rector impropriate is entitled to the chief seat,(l) and the vicar may by prescription claim a seat in the chancel.(m) As to the regulation of pews under the New Church Building Acts, see Dig. P. ii. tit. Church (Pews.) As to a right to a pew as an easement, see post, § 481 *et seq.*

By the canon law, the repair of the church belongs to the rector, but by the common law it belongs to the parishioners ;(n) but generally the parson is bound to repair the chancel ;(o) so, impropriators are bound of common *right to repair the chancels ;(p) and it seems that they are com- [*80] pellable by the sequestration of the Spiritual Court.(q)

Where there is a rector and a vicar, it is said they shall contribute.(r) As to the repairing and building of churches under the Church Building Acts, see Dig. P. ii. tit. Church Building ; see also as to the breaking into and stealing from churches Dig. P. i. tit. Larceny ; as to setting fire to churches, Id. P. i. tit. Malicious Injuries ; as to destroying churches in a riot, Id. P. iii. tit. Hundred ; as to levying church rates, Id. P. iii. tit. Rates ; as to exempting churches from rates 3 & 4 W. 4, c. 30.

91. By the common law the rector has the freehold in the churchyard, subject to the rights of the parishioners to be buried there, and he may bring an action of trespass, if his right be invaded ;(s)(1) so, the trees and the grass belong to him, and if cut down, the incumbent may bring his action, and this is not triable in the Spiritual Court ;(t) so, the lessee of the incumbent, if the churchyard be let, may bring his action, the soil and freehold being in the incumbent,(u) although where there is both a rector and a vicar,

(c) *Byerley v. Winder*, 3 B. & C. 19 ; S. C., 7 D. & R. 564.

(d) *Fuller v. Lane*, sup.

(e) *Lonsler v. Haywood*, 1 Hagg. 294 ; S. C. 1 Y. & J. 583. (f) 2 Consist. 319.

(g) *Harris v. Drewe*, 2 B. & Ad. 164. (h) 3 Man. & Ry. 389.

(i) 3 Add. 6. (k) 3 Phill. 331.

(l) *Hall and Ellis*, Noy, 153. (m) *Johns*, 242, 243.

(n) *Ball v. Cross*, 1 Salk. 164 ; 1 Holt, 138.

(o) *Peuse v. Prowse*, 1 Ld. Raym. 59 ; S. C., nom. *Pierce v. Prowse*, 1 Salk. 164 ; S. C., Carth. 360.

(p) *Gibs*, 199.

(q) *Wats. Cl. L. c. 39.*

(r) *Lindw.* 253.

(s) 1 Curteis, 260.

(t) *Hilliard v. Jefferson*, 1 Lord Raym. 212 ; Br. Abr. "Tresp." 210.

(u) 2 Roll. Abr. 337.

(1) In Pennsylvania, most of the churches, &c. are held either by the corporation, or trustees for the society ; in them is vested the title, and as respects third persons, the exclusive right of maintaining their rights by action. *Ungst v. Shortz*, 5 Whit. 506.

it seems doubtful to whom the trees belong.(x) And such freehold is said to be in him for public purposes, and not for private emolument;(y) therefore, although a clergyman cannot be compelled to bury the corpse of any person, though a parishioner, in any particular vault or other particular part of the churchyard,(z) yet he cannot grant the exclusive use of a vault—only leave to bury there in each particular instance;(a) so, no man can make a private door into the churchyard without the consent of the minister whose freehold the church is, and a faculty also from the *bishop.(b) So, [*81] no one can build on a churchyard without his consent;(c) yet a man may prescribe to have a way through a church or churchyard.(d)

A rector may cut down timber growing in the church yard for the repair of the parsonage house or the chancel, but not for any common purpose, and this he may be justified in doing under the 35 E. 1;(e) so, he may cut down timber for repairing any old pews that belong to the rectory.(e)

The churchwardens are by virtue of their office to see that the footpaths are kept in proper order, and the fences in repair;(f) and it seems that by custom the parishioners are bound to make the repairs:(g) yet if the owner of lands adjoining to the churchyard have used, time out of mind, to repair so much of the fence thereof as adjoineth to their ground, such custom is a good custom, and the churchwardens have an action at common law for the same.(h) As to the repair of the churchyard under the statute 35 Ed. 1. see Dig. P. ii. tit. Church (Churchyards,) and the statute against converting lands into churchyards, P. iii. tit. Mortmain.

92. After induction the freehold of the glebe is in the parson;(i) yet he may not alienate the same,(k) otherwise than he is authorised so to do by the 17 G. 3, c. 21, and other acts empowering the incumbent under certain restrictions to mortgage the glebe for the purpose of making parsonages;(l) or to sell or exchange the glebe lands for particular purposes;(m) so, an [*82] incumbent may not commit *waste by cutting down trees;(n) but the digging in glebe lands has been held not to be waste.(o)

Glebe lands in the hands of the parson shall not pay tithes to the vicar, though endowed generally of the tithe of all lands in the parish; nor being in the hands of the vicar shall they pay tithe to the parson, it being a rule in the canon law that the church shall not pay tithe to the church.(p)

By the 28 H. 8, c. 11, s. 6, it is provided that if the incumbent die, after having manured and sown the glebe land, he may bequeath the profits of the corn growing thereon; but if his successor be inducted before severance

(x) Lindw. 267.

(y) Bryan v. Whistler, 8 B. & C. 293; S. C. 2 Man. & Ry. 330.

(z) Ex parte Blackmore, 1 B. & Ad. 122. (a) Bryan v. Whistler, sup.

(b) Degge, Par. L. 88, 89.

(c) St. George's, Hanover Square, (Rector, &c.) v. Steuart, 2 Str. 1126.

(d) 2 Roll. Abr. 265. (e) Strachy v. Francis, 2 Atk. 217.

(f) 1 Curteis, 621. (g) 2 Inst. 489.

(h) 2 Roll. Abr. 287; Gibbs, 194. (i) Gibbs, 661.

(k) Lind. 149. (l) See Dig. P. ii. tit. Benefices.

(m) Id. P. i. ii. tit. Church, Inclosure, Land-tax Redemption, Leases, &c.

(n) Gibbs, 661.

(o) The Countess of Rutland's case, 1 Lev. 107; S. C., 1 Sid. 152; S. C., 1 Keb. 557; 5 Mod. 917.

(p) Blinco v. Marson, Moor, 457; S. C., nom. Blinco v. Marston, Cro. El. 479; S. C., Sav. 3; Brownl. 69.

thereof, he shall have the tithe of the same, sed secus if he be inducted after.(g)

SECTION V.

MILLS.

§ 93. Suit at Mill.
Who obliged to do Suit.
Extent of the Right.

§ 93. Mills when Corporeal Hereditaments.
Tithes for Mills.

93. Mills had formerly a great value attached to them from the prescriptions and customs which gave the lords of manors a right to require the inhabitants within the manor to grind their corn there,(r) and the custom has been held good;(s) and so, although the inhabitants be not tenants;(t) *and a house newly erected within the manor has been held [*83] subject to the custom;(u) and excessive toll or neglect to grind the corn when sent were held to be the only excuses for not employing the miller;(u) and the custom is not confined to corn growing in the manor, but has, after much discussion, been held to extend to all ground corn wherever it might grow, and consequently to the use of American flour;(x) but where there is neither tenure nor prescription an exclusive claim of this kind cannot be maintained,(y) unless by force of prerogative.(z) See further as to TITLE, and also INJURIES TO THINGS REAL.

Mills when attached to the freehold are corporeal hereditaments,(a) and ejectment will lie for them, whether they are corn-mills or water-mills;(b) and there may be a copyhold of a mill;(c) and a mill is rateable as real property, and will confer a settlement.(d)(1)

Tithes are due for a mill ancient or new, and it was formerly held that the tenth toll dish was due of common right;(e) but it is now settled that the tithes of a mill are personalty, and the tenth part of the profits, after deducting the charges of erecting the mill, &c., belong to the parson.(f) See further, post, § 148.

(g) 2 Bulstr. 184; 1 Roll. Abr. 655; Gibs. 662.

(r) F. N. B. 122; 2 Inst. 621.

(s) Hix v. Gardiner, 2 Bulstr. 195; S. C., nom. Higgis v. Gardener, 1 Roll. Abr. 559; Green v. Robinson, Hardr. 174; Coryton v. Lithebye, 2 Saund. 114; S. C., 2 Lev. 27; 1 Ventr. 167; 2 Keb. 631. 803, &c.; Chapman v. Flexman, 2 Ventr. 286.

(t) Drake v. Wylesworth, Willes, 654. (u) Scintley v. Bendel, Hardr. 177.

(x) Cort v. Birkbeck, 1 Dougl. 218; Case of Manchester Mills, cited Id. 221. See also 8 Brown, P. C., 106; 4 Madd. 114; also, Norfolk (Duke) v. Myers, 4 Madd. 83.

(y) Scintley v. Bendel, sup. (z) F. N. B., by Hale, 122, n. (C.)

(a) Steward v. Lombe, 4 J. B. Moore, 288, 289.

(b) Fitzgerald v. Marshall, 1 Mod. 90. See also 3 Ridgw. 319.

(c) Ward's case, 4 Leon. 241.

(d) R. v. Ottley (Inhabs.) 1 B. & Ad. 161.

(e) Gumley v. Falkingham, 1 Show. 281; Hall v. Macket, 3 Anstr. 915.

(f) Newte v. Chamberlain, 1 B. P. C. 157.

(1) Ante, 16, n. 1; and the water power passes as appurtenant. Pickering v. Stapler, 5 S. & R. 107.

[*84]

*SECTION VI.

COMMONS AND WASTE LANDS.

§ 94. Distinction between Commons and Waste Lands.	§ 95. Improvement.
What Interest therein rateable.	Rights as to Fences.
Cattle-gates.	Liabilities to repair Fences.
Disturbance.	To preserve Boundaries.
95. Encroachments.	Commissioners to ascertain Boundaries.

94. Commons⁽¹⁾ or common fields, as the name imports, are pieces of ground in which individuals have a joint and several property, and are distinguished from wastes, or waste lands, which are such parts of a manor as the lord originally left waste or uncultivated for the common use and benefit of himself and his tenants with his license, whence arose the incorporeal hereditaments known by the name of "right of common," as to which see post, § 267, and as to the rights of the lord and the tenant see post, *CORRHOLDS*, § 845.

Land over which there is a right of common, and which affords a beneficial occupation, is rateable, but the occupier must have such a possession as will enable him to maintain trespass, which a mere commoner cannot do.^(g) Most usually the ownership of the soil is in the lord of the manor where it is situate, but there are many cases where there is a joint and several property in fields, called on that account "common fields," which are used for their common benefit. In that case each party is in possession of a distinct interest for which he may maintain ejectment, and consequently is rateable.^(h) So, a cattle-gate or a right of pasture within any field held by several in common is a tenement, which "was held to pass by lease [*85] and release, now by release only,⁽ⁱ⁾ and could not be devised but according to the Statute of Frauds.^(k) So, ejectment may be maintained for it.^(l) Cattle-gates are recognised in the Game Act, 1 & 2 Will. 4, c. 32, s. 10.^(m)

Where any person makes use of a common to the injury of the commoner, this is called a disturbance, for which the party has his remedy.⁽ⁿ⁾

95. If any person build upon or inclose commons or waste land without the license of the lord, this as against a subject is termed an encroachment, but as against the Crown a purpresture or encroachment. If however an inclosure has existed with the knowledge of the lord of the manor or of his steward for some time, notice must be given to the party to throw it up, before ejectment can be brought against the tenant as a trespasser;^(o) but it has been a *veraxio questio*, whether a lessee who encroaches on the waste can

(g) *R. v. Watson*, 5 East, 480; *S. C.* 2 Smith, 45.

(h) *R. v. Tewksbury*, 13 East, 155.

(i) 4 & 5 Vict. c. 21; *Dig. P. iii. tit. Leases*; *R. v. Locksley*, 1 Barr. Sett. Ca. 315; *S. C.* Bott. 349.

(l) *R. v. Tewksbury*, sup.

(m) See post, § 353 *et seq.*

(k) *R. v. Whitley*, 1 T. R. 137.

(n) See *Dig. P. iii. tit. Game*.

(o) *Doe v. Wilson*, 11 East, 56.

(1) *Trustees v. Robinson*, 12 S. & R. 32. *Worcester v. Green*, 2 Pick. 425.

acquire a possessory right after an uninterrupted possession, or whether he shall not be supposed to have enclosed for the benefit of the lessor after the term; (p) *prima facie* every inclosure made by a tenant adjoining the demised premises is presumed to be made by him for the benefit of the landlord; but this presumption may be rebutted by evidence. (q) See further post, as to title gained by encroachment, TITLE TO THINGS REAL.

A clause is usually inserted in Inclosure Acts, that no encroachment in a waste which has existed twenty years before the passing of the Act shall be considered as a part of the waste, and no title derived by virtue of such encroachment shall be disputed. A similar clause is to be found in [*86] the 6 & 7 W. 4, 115, for inclosing common and arable fields, (r) and so likewise in 10 G. 4, c. 50, which contains several provisions as to unlawful inclosure. (s)

The lord's right to approve as against the commoner is recognised by the 20 H. 3, c. 4; 13 E. 1, c. 46, and 3 & 4 E. 6, c. 3, (t) and by subsequent acts as the 13 G. 3, c. 38; 41 G. 3, c. 109, the General Inclosure Act, and other Acts, lords and tenants are empowered to enclose commons under certain regulations; (u) also as to exchanges of lands lying in common fields 4 & 5 W. 4, c. 30. (x) An inclosure has the effect of changing the tenure of lands by converting copyhold into freehold unless the contrary be expressly provided for, (y) and the legal freehold does not vest in the allottee until the execution and proclamation of the award. (z)

With the subject of inclosure is connected that of fences; whatever serves to part fields one from another is a fence; and it may be either a hedge, a ditch, a bank, wall, gate, &c.; for a ditch may be a legal fence if it serve the purpose of a fence. (a) Where two adjacent fields are separated by a hedge and ditch, the hedge *prima facie* belongs to the field where the ditch is not; if there are two ditches, one on each side the hedge, then the ownership of the hedge must be ascertained by proving acts of ownership. (b) For a person making a ditch usually cuts to the extremity of his land; (b) and where lands abutting on a ditch, and a lane on each side, belong to different owners, the presumption is that the hedge and ditch on either side belong to the owner or occupier of the land on that side; (c) and if a man makes a bank, it as well as the ditch, will, it is presumed, be made on his own ground, and therefore the land which constitutes the ditch is in point of law a part [*87] of the close, though it be on the outside of the bank; (d) for although a party is supposed to dig the ditch at the extreme point of the land, yet he may not dig so near, as to cause his neighbour's land to fall in. (e)

A tenant is bound to repair the fences, and a landlord may maintain an action against him for not so doing, upon the ground of the injury done to

(p) *Creach v. Wilnot*, 2 Taunt. 160, n. See also *Doe v. Mulliner*, 1 Esp. 460; *Doe v. Davies*, Id. 461; *Bryan v. Winwood*, 1 Taunt. 208; and *Adams on Eject.* 51, 3rd ed.; *Woolr.* on Comm. 390.

(q) *Doe v. Williams*, 7 C. & P. 332; *Doe v. Murrell*, 8 C. & P. 134.

(r) See Dig. P. i. Inclosure.

(s) Id. tit. Land Revenue of the Crown.

(t) See Dig. P. i. tit. Improvement, Commons.

(u) Id. P. i. ii. tit. Commons, Inclosure.

(x) Id., P. i. tit. Exchange.

(y) *Nevill v. Joddrell*, 2 T. R. 415.

(z) *Farrer v. Billing*, 2 B. & A. 271.

(a) *Ellis v. Arnison*, 1 B. & C. 76.

(b) *Vowles v. Miller*, 3 Taunt. 138.

(c) *Noge v. Reed*, 1 Mann. & Ry. 65.

(d) *Doe v. Pearsey*, 7 B. & C. 307.

(e) *Wyatt v. Harrison*, 3 B. & Ad. 87.

his inheritance ;(*f*) and it is no excuse that the plaintiff did not set out proper wood for repairs, if the defendant do not shew that a request was made to the plaintiff, or a custom of the country in this respect.(*g*)(1) So, a tenant is bound to preserve the boundaries of the lands held by him, and if he permit them to be destroyed, so that the lands cannot be distinguished, he will be compelled to give others of equal value, the same to be ascertained by a commission issuing out of the Court of Chancery,(*h*) and the same applies to cases where there are several co-lessees.(*i*) See further as to waste, post, INJURIES TO THINGS REAL. The Building Act contains several provisions as to party-walls.(*k*) The Malicious Injuries Act imposes a penalty of 5*l.* on any person destroying any fence, wall, gate or stile, and makes a second offence punishable with twelve calendar months' imprisonment and hard labour.(*l*) As to sea-walls and the banks of rivers see *infra*, § 107.

By the General Inclosure Act the commissioners are required to ascertain the boundaries of waste and common lands that are to be enclosed, and the 2 & 3 W. 4, c. 80, contains various provisions authorizing archbishops, bishops [*88] and other ecclesiastical persons to ascertain the boundaries of church property, where they are unknown or disputed. In other cases the courts of equity have from an early period afforded relief either by directing an issue, or granting a commission, as the justice of the case required, the granting such commissions being a very ancient branch of equitable jurisdiction(*m*) in cases where there exists no remedy by distress ;(*n*) so, where there has been an intermixture of boundaries occasioned by unity of possession ;(*o*) so, where charity lands have been let at a great undervalue, and are intermixed with other land belonging to the tenant, the Court will grant a commission.(*p*) But the issuing of such commissions is not a matter of course ; it will be granted upon weighty grounds only ;(*q*) the Court, therefore, will not grant a commission if defendant denies he has any of plaintiff's lands in his possession, for that would be to admit plaintiff's title in general ; but if defendant has admitted plaintiff's title, and the dispute is about the particular lands, then a commission is proper.(*r*) The plaintiff must establish by evidence or the admission of the defendant his right to some land before a commission will be granted ;(*s*) so, the plaintiff must make out that he has some equitable ground upon which to call for the assistance of this court ;(*t*)

(*f*) *Cheetham v. Hampson*, 4 T. R. 319.

(*g*) *Whitfield v. Weedon*, 2 Chitt. 485.

(*h*) *Att.-Gen. v. Fullerton*, 2 V. & B. 263.

(*i*) *Willis v. Parkinson*, 1 Swanst. 49.

(*k*) See Dig. P. ii. tit. Building.

(*l*) See Dig. P. I. Malicious Injuries.

(*m*) *Mullineaux v. Mullineaux*, Toth. 101 ; *Pickering v. Kempton*, Ib. ; *Windsor (Dean) v. Kinnerley*, Id. 126 ; *Spyer v. Spyer*, Nels. 14 ; *Boteler v. Spelman*, Finch, 96 ; *Wintle v. Carpenter*, Id. 162 ; *Glyn v. Seawen*, Id. 239.

(*n*) *Leeds (Duke) v. Powel*, 1 Ves. 172.

(*o*) *Willis v. Parkinson*, 2 Mer. 507 ; S. C. 1 Swanst. 9.

(*p*) *Reresby v. Farrer*, 2 Vern. 414.

(*q*) *Davenport v. Bromley*, Finch, 17.

(*r*) *Ely (By.) v. Kenrick*, Bunb. 322.

(*s*) *Chapman v. Spencer*, 2 Eq. Ca. Abr. 163, pl. 1 ; *S. P. Godfrey v. Littell*, 1 R. & My. 56.

(*t*) *Ib.*, recognising *Wake v. Conyers*, 1 Eden, Ca. temp. Lord Nottingham, 331 ; *Speer v. Cawter*, 2 Mer. 410. See also *Leeds v. New Radnor Corporation*, 2 B. C. C. 518 ; *Rouse v. Barker*, 3 B. P. C. 180.

(1) Where the lease is silent, tenant is bound to make ordinary, not permanent repairs. *Long v. Fitzsimmons*, 1 W. & S. 530.

so, the bill must clearly shew that without the assistance of the court, the boundaries cannot be ascertained ;(*u*) and such commission does not usually lie to settle *the boundaries of parishes, that being a mere question of law ;(*x*) and a bill to ascertain the boundaries of two manors, has [*89] been dismissed, because there was no dispute about the soil ;(*y*) and a commission to ascertain the boundaries of a manor or parish, ought not to be granted, unless all the parties who have a profitable interest are before the Court.(*z*) And this rule has also been followed in other cases.(*a*)

SECTION VII.

WOOD AND TREES.

§ 96. Freeholds.

| § 96. Property in Trees.
96. Stealing Trees, &c.

§ 96. As to what land passes under the name of woods or trees see ante, § 87. A freehold it seems may be had in trees, although the owner has not the freehold of the soil.(*b*)

As between landlord and tenant, trees are a part of the inheritance, see ante, § 25 ; and a wood growing in the glebe or in the churchyard cannot be felled by the incumbent except under certain circumstances.(*c*) As to what trees are timber see ante, § 26.

As to the property in trees growing upon the limits of two adjoining lands the law is not at present clearly defined. If a tree grow near the confines of the land of two parties, it was held that it belonged to the party by whom it was first planted, although some of the roots extended into *the soil of the other party, yet he would not be justified in cutting the [*90] roots, for the body of the tree being in the planter's own ground, the residue of the tree belonged to him.(*d*) It has however been said, that if A. plant a tree upon the extreme limits of his land, and the tree extends its roots into the land of B., next adjoining, A. and B. are tenants in common of this tree ; but if all the roots grow into the land of A., though the boughs overshadow the land of B., yet the branches follow the root, and the property of the whole is in A.(*e*) If however a tree grows in a hedge that divides the lands of A. and B., and by its roots takes nourishment in the lands of both, they are tenants in common.(*f*) But independently of the question of property, a man may be liable to an action if he suffer the branches of his tree to overhang the lands of another so as to deprive the latter of air or light,(*g*) on the

(*u*) *Miller v. Warmington*, 1 Jac. & W. 491.

(*x*) *St. Luke's v. St. Leonard's*, 1 B. C. C. 41.

(*y*) *Wake v. Conyers*, sup.

(*z*) *Atkins v. Hatton*, 2 Anstr. 386.

(*a*) *Miller v. Warmington*, sup. ; *Raley v. Best*, 1 R. & My. 659 ; but see *Wills v. Slade*, 6 Ves. 498 ; *Baring v. Nash*, 1 V. & B. 551.

(*b*) *Stanley v. White*, 14 East, 332.

(*c*) See § 91, 92.

(*d*) *Masters v. Pollie*, 2 Roll. 141.

(*e*) *Waterman v. Soper*, 1 Lord Raym. 737 ; but the former of these decisions has been preferred in a subsequent case, *Holder v. Coates*, M. & M. 112.

(*f*) *Anon.* 2 Roll. 255.

(*g*) *Norris v. Baker*, 1 Roll. Rep. 394.

general principle that the owner of the land is entitled to whatever is perpendicularly situated above or beneath its surface ;(*h*) unless he have any claim to an easement.(*i*) As to the interest in trees, as between lord and copyholder see post, § 849, also post, tit. ESTATES AND WASTE. As to the property in trees growing in the highways see post, § 102.

The Larceny Act makes the stealing of any tree, sapling, shrub, or under-wood punishable with a fine of £5 or under for the first offence, twelve months' imprisonment for the second offence ; and a third offence is made felony punishable as simple larceny.(*k*) The Malicious Injuries Act contains similar provisions as to injuries done to trees ;(*l*) as to the inclosing [*91] woods in forests see 22 E. 4, c. 7, and *the preservation of woods 35 H. 8, c. 17 ; and 13 El. c. 25. See Dig. P. i., tit. Woods ; as to planting trees in inclosures, Ib. tit. Commons ; as to the duty on timber and lading the decks of vessels with timber, Ib. tit. Timber.

SECTION VIII.

FORESTS AND CHASES, ETC.

§ 97. There are certain privileged places, as forests, chases, parks, and warrens fitted for the preservation of animals *feræ naturæ*, the property in which is as long only as they remain in the custom and power of the owner. The forest which is the most ancient of these and belongs solely to the Crown, was originally governed by laws peculiar to itself, but is now under the management of her Majesty's commissioners of woods and forests.(*m*) A chase is in the hands of a subject a privileged place for beasts of the forest.(*n*) A park is an inclosed place privileged for the keeping of wild beasts, which could not formerly be made without her Majesty's license or at least immemorial prescription.(*o*) A free warren is a place privileged by prescription or by her Majesty's grant for the preservation of beasts or fowls of warren, as hares, conies, partridges, pheasants ;(*p*) but a grant by her Majesty of free warren, in lands of which her Majesty is seised in fee, is only a grant of free warren in gross, and will not pass by the grant of a manor and all free warrens thereto appertaining.(*q*) See further as to the distinction between these places and their respective privileges, Dig. P. iii., [*92] tit. Game. Modern *places known by the name of parks are, together with the deer kept, the subject of some special provisions in the Larceny and Malicious Injuries Act.(*r*)

(*h*) 2 Comm. 16 ; Fearn's Post. Works, 8 ; and see Palm. 536.

(*i*) See post, as to Easements, § 356.

(*k*) See Dig. P. i., tit. Larceny, (Trees).

(*l*) Id., tit. Malicious Injuries.

(*m*) See Dig. P. i., tit. Land Revenue of the Crown, P. ii., tit. Game.

(*n*) 4 Inst. 314.

(*o*) 2 Inst. 199 ; Davies v. Powell, Willes, 46.

(*p*) Manw. 44 ; 1 Inst. 233.

(*q*) Morris v. Dimes, 1 Ad. & Ell. 654 ; S. C., 3 Nev. & Man. 671.

(*r*) See Dig. P. i., Larceny, Malicious Injuries.

SECTION IX.

MINES AND MINERALS.

I. Property in Mines.

§ 98. Part of the Freehold. Ownership of the Surface and of the Mines. Property in Minerals.	§ 98. Property in Highways. under Inclosure Acts. Right to Dower in Mines. Royal Mines.
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II. Grant of Mines or Minerals.

99. What passes. What a license only.	100. Lord and Copyholder. Landlord and Tenant. Patron and Incumbent.
100. Tenant for Life.	

III. Right to work or open Mines.

100. Right under License or Lease.

IV. Rateability of Mines.

101. Coal Mines only rateable.	101. Exceptions.
	101. Titheable.

UNDER this head may be considered : 1. The property in mines ; 2. Grant of mines ; 3. Right to work or open mines ; 4. Rateability, &c. of mines.

I. Property in Mines.

98. Mines are a part of the freehold, and *prima facie* the owner of the freehold has a right to the mines and minerals underneath;(s) but this is only a presumption of *law which may be rebutted by showing a distinct title to the surface and to that which is underneath;(t) for [*93] mines may form a distinct possession and different inheritances.(u)

To establish an adverse claim to the minerals against the owner of the surface the clearest evidence is necessary, therefore, where the lord proved a uniform exercise of enjoyment of his right to the minerals, it was held to prevail;(y)(1) and it was sufficient for him to show that the right had been exercised, if not in the particular lands in question, yet in lands similarly circumstanced;(y) but it is necessary, however, for the claimant to shew that the right has been exercised over the minerals in question; shewing acts of ownership as lord, by shooting, taking estrays and the like is not sufficient to establish the right to the minerals;(z) so leases of minerals in other parts of the waste will not be admitted in evidence,(z)

(s) 1 Inst. 4, b ; 2 Com. 18.

(t) Curtis v. Daniel, 10 East, 273.

(u) Cullen v. Rieh, 2 Str. 1142 ; S. C., Bull. N. P. 102.

(y) Barnes v. Mawson, 1 M. & S. 84.

(z) Tyrwhit v. Wynne, 2 B. & A. 554.

(1) But trover cannot be maintained by an adverse claimant to the land. Mather v. Trinity, 3 S. & R. 509.

As to the claim of the owner of the surface to minerals, it has been held, that the presumption, that the right to the minerals accompanied the fee-simple of the land, might be rebutted by the absence of enjoyment by the plaintiff, and the user of persons not the owners of the soil ;(a) but an adverse possession of copper mines for upwards of twenty years by certain tenants customary as well as freehold was held sufficient to establish their right.(b)

If minerals are once severed from the inheritance, they are personal chattels which go to the person next entitled to the inheritance.(c)

Mines in the highways belong to the owner of the soil.(d)

In the case of inclosure it appears, that if minerals are not mentioned in [*94] the Act, the several owners will be *interested in them according to the nature of the tenure, but mines will not be reserved to the lord under the ordinary clause "saving all royalties";(e) so, although allotments under such Acts usually carry the soil with them, yet if a party's right to the mines is expressly excepted in the Act, his rights and liabilities as owner will remain in the same parish, although the allotments under the Act are carried into other parishes.(f)

Dower is due of mines wrought during the coverture, whether by the husband or by lessees for years ;(g) so, whether the mines are under the husband's own land, or have been absolutely granted to him to take the whole stratum in the land of others ;(g) so, if land assigned for dower contain an open mine, tenant in dower may work it for her own benefit,(g) but she is not entitled to unopened mines.(g)(1)

Dower may be assigned of mines either collectively with other lands or separately of themselves, and it shall be assigned by metes and bounds if practicable ; otherwise, either by a proportion of the profits, or separate alternate enjoyment of the whole for certain periods.(g)(2) An assignment of dower by deed, with livery of seisin, was held to be a good assignment.(h) As to dower generally, see post, ESTATES (DOWER).

Mines which contain gold and silver are denominated "royal mines," because they belong exclusively to the Crown, (i) insomuch that although her Majesty grant lands with all mines in them, royal mines will not pass ;(k) and by force of the prerogative her Majesty may come upon any man's estate and search for mines.(l)

[*95] Before the 1 W. & M. c. 30, and the 5 & 6 W. & M. *c. 6, it was held that if there was any gold or silver in the baser metals, this

(a) *Rowe v. Grenfel, Ry. & Mood.* 396.

(b) *Curtis v. Daniel*, sup.

(c) *Winchester (Bp.) v. Knight*, 1 P. Wins. 406.

(d) See post, § 102.

(e) *Townley v. Gibson*, 2 T. R. 701.

(f) *R. v. Pitt*, 2 Nev. & Man. 363.

(g) *Stoughton v. Leigh*, 1 Taunt. 402.

(h) *Rowe v. Power*, 2 N. R. 1.

(i) 2 Inst. 577.

(k) *R. v. Northumberland (Earl)*, Plowd. 310.

(l) *Ib.* But see *Lyddall v. Weston*, 2 Atk. 20, and *Seaman v. Vawdry*, 16 Ves. 393.

(1) And she may work it to any extent, but not to open new pits. *Cranch v. Goodyear*, 1 Rand. 258; and in setting out the dower, the condition of the land at the death of the husband must be considered ; subsequent openings are to be omitted as the widow could not work them : as to these she is dowable as of ordinary land, and it will be set off so as not to interfere with the mines. *Coates v. Cheever*, 1 Cow. 460-74. But where the practice had always been to quarry by sections to the depth of ten feet, it was held the whole tract must be considered as opened for the purposes of entitling tenant in dower to work it. *Billings v. Taylor*, 10 Pick. 469.

(2) *Coates v. Cheever*, 1 Cow. 479.

constitutes it a royal mine ;(*m*) but see the provisions which set this question at rest, Dig. P. iii. tit. Mines.

II. Grant of Mines or Minerals.

§ 99. A grant of mines to take the whole *stratum* of the land of others is the grant of a real hereditament in fee-simple ;(*n*)(1) but that the lands may pass under the grant of the minerals it is necessary that there should be livery of seisin ;(*o*) otherwise only a liberty to dig for the minerals passes ;(*p*) and the owner of the soil is in that case not excluded from digging for minerals, therefore, when a mortgagor and mortgagee in fee joined in conveying land to a purchaser, who by the same instrument covenanted with the mortgagor, his heirs and assigns, that it should be lawful for them to dig for coals and carry them away, held that this was a license only and did not exclude the purchaser from getting coal there ;(*q*) so, in respect of the mortgagor it could not operate as an exception or reservation, he not having the legal estate in him, the covenant therefore would operate only as a grant, and a grant would not pass the land itself without livery ;(*q*) a reservation of this kind must expressly shew that it was the intention of the parties, that the mines should not pass in the conveyance ;(*r*)(2) otherwise, although the grantor may have the legal estate, the mines may be granted over, and a mere license to dig for the minerals is thus only reserved. (*s*)(3) It seems however to be settled that to a grant of mines is *necessarily incident the right to enter and work them without any express authority [*96] for that purpose.

III. Right to work or open Mines.

§ 100. There may be a right to work mines either under a license or a lease, the latter of which is the most usual and proper. A license is not of the same force as a lease ; for the latter gives an actual estate in the land,

(*m*) R. v. Northumberland (Earl), sup.

(*n*) Stoughton v. Leigh, 1 Taunt. 402.

(*o*) 1 Inst. 6, a ; but see Transfer of Property Act, 7 & 8 V. c. 76, Prec. Conv. Append. No. XVIII.

(*p*) Shep. Touchst. 96.

(*q*) Chetham v. Williamson, 4 East, 469.

(*r*) Cardigan (Earl) v. Armitage, 2 B. & C. 197.

(*s*) Huntingdon (Earl) v. Mountjoye (Ld.), Godb. 17 ; S. C. 4 Leon. 147 ; Anders. 397 ; Moor, 17.

(1) Grubb v. Guilford, 4 Watts, 223-46.

(2) Gibson v. Tyson, 5 W. 34, where it seemed to be considered that in a reservation the scientific meaning of the word minerals would not be given to it ; but it would without more, include merely those things which in common parlance are considered minerals.

(3) The right to the soil and the mines, or right to dig ore may be separated, and when they are, the latter will not be included in a reservation of a right to dig on land though the land out of which it is reserved is included within the general description. Shoenberger v. Lyon, 7 W. & S. 184.

but the former gives only a right to the minerals as personal chattels, when they are dug ;(*t*) so, although a license is not revocable at the will of the grantor, as it carries an interest in the land, yet it is determinable on simple notice.(*x*) So if it do not contain clear words to give the grantee the exclusive right to dig for minerals, the grantor or his assigns may exercise the right in common with him.(*y*)

As to the right to work old mines or open new ones by persons in other cases, having an estate less than a freehold of inheritance, that depends upon the nature of the estate.

A tenant for life may dig for gravel, lime, clay, stone and similar minerals for the purposes of repairing the buildings or manuring the land.(*z*) So, of such mines as are open, he may dig and take the profits,(*a*) but he may not open new mines.(*b*) Yet a tenant for life of coal mines may open new pits or shafts for the working old veins of coals ;(*1*) it being hazardous to grant an injunction to stay the working of a coal mine, because it may ruin the colliery forever.(*c*) As to waste by tenant for life, see post, tit. WASTE.

[*97] *It is now settled, that in the absence of special custom the property in minerals is vested in the lord, and the right of possession in the tenant ; consequently neither party can do any act to profit by the mines without the consent of the other.(*d*) And a copyholder shall have trespass against the lord for breaking his close and digging his coals ;(*e*) and so the action is maintainable against the owner of an adjoining colliery for breaking and entering the subsoil of a copyholder, and taking coals therein, although no trespass be committed on the surface.(*f*) The tenant, however, on the other hand has no right to the minerals,(*g*) and if he work the mines he commits waste,(*h*) unless where he has the right by special custom.(*i*) (As to the right of lords and copyholders, see post, TENURES, §§ 853 et seq. ; waste by copyholders, see post, INJURIES TO THINGS REAL.)

As between landlord and tenant it appears that the lessee for years may work mines that are open, for they are the annual profit of the land, but he cannot make new mines, for that would be waste ;(*k*) but if a man has mines hid in his land, and leases his land and all mines therein, the lessee may then open any mine.(*k*) (As to waste by tenant for years, see post, INJURIES TO THINGS REAL.)

As between the patron and the parson, it appears that if the parson open

(*t*) Doe v. Wood, 2 B. & A. 739.

(*x*) Roberts v. Davy, 4 B. & Ad. 672.

(*y*) Chetham v. Williamson, sup. ; Huntingdon, (Earl) v. Mountjoye, (Ld.), sup.

(*z*) 1 Inst. 53, b. ; Moyle v. Moyle, Ow. 67 ; S. C., 2 Roll. Abr. 816.

(*a*) Lord Darcy v. Ashwith, Hob. 296 ; Saunders' case, 5 Co. 12 ; 1 Inst. 51, b. ; Hutt.

19. See also Vincr v. Vaughan, 2 Beav. 446.

(*b*) 1 Inst. 54, b. ; Whitfield v. Bewit, 2 P. Wms. 240.

(*c*) Clavering v. Clavering, 2 P. Wms. 388 ; S. C., Sel. Chan. Cas. 79.

(*d*) Winchester (Bp.) v. Knight, 1 P. Wms. 406.

(*e*) Player v. Roberts, W. Jo. 243.

(*f*) Lewis v. Branthwaite, 2 B. & Ad. 437.

(*g*) Rowe v. Brenton, 8 B. & C. 737.

(*h*) Bourne v. Taylor, 10 East, 189.

(*i*) Curtis v. Daniel, 10 East, 273.

(*k*) Saunders' case, 5 Co. 12 ; 1 Inst. 84, b.

a mine in his glebe, this will not be waste, for otherwise none of the mines under glebe lands would be opened. (*l*)

IV. Rateability, &c. of Mines.

§ 101. Coal mines being alone mentioned in the 43 El. c. 2, it has been held that mines of other minerals are not *liable to be rated to the relief of the poor, (*m*) and by the 5 & 6 W. 4, c. 50, s. 27, also not [^{*98}] to the highway rate; (*n*) to this however there are some exceptions, for stone quarries are not exempt; (*o*) so, slate-quarries; (*p*) so, clay-pits; (*q*) so, in *Rowls v. Gell*, (*r*) a lead mine was held to be rateable, and so likewise in *R. v. St. Agnes* (*s*) tin mines have been held rateable.

An action of ejectment is maintainable for recovering the possession of a mine; (*t*) but it seems doubtful whether ejectment will lie for an unopened mine; (*x*) so, ejectment cannot be brought by the lord of a manor for mines situate in the lands of his copyhold tenant in the absence of special custom; (*y*) so, it will not lie in respect of a license only to work mines. (*z*)

Tithes are not regularly due of things which are of the substance of the earth; (*u*) but mines or minerals may be titheable by custom. (*b*) See further post, § 148; see also further post, INJURIES TO THINGS REAL; and as to the statutory provisions respecting mines, see Dig. P. i. and iii. tit. Mines.

*SECTION X.

[*99]

WAYS.

§ 102. Different kinds.

I. Public Ways.

§ 102. What a Highway.
Highway foundrous.
Turnpike Roads.
Property in the Soil.
Who Owner of the Soil.
Trees in the Highways.
Mines and Minerals, &c. in the Highways.

§ 102. Repair of Highways.
Bridges.
Individuals bound to repair.
By Prescription.
By Tenure.
By Inclosure.

(*l*) Countess of Rutland's case, 1 Lev. 107; S. C., nom. *Rutland v. Greene*, 1 Kcb. 557; 1 Sid. 152.

(*m*) See Dig. P. iii. tit. Poor (Rate).

(*o*) *R. v. Allesbury*, 1 East, 534.

(*q*) *R. v. Brown*, 8 East, 528.

(*t*) *Harebottle v. Placock*, Cro. Jac. 21; *Comyn v. Kincto*, Id. 150; *Wild's case*, Carth. 277; *Cullen v. Rich*, Bull. N. P. 102.

(*x*) *Sayer v. Pierce*, 1 Ves. 232.

(*z*) *Doe v. Wood*, 2 B. & A. 139.

(*b*) *Burton v. Spencer*, 2 Wood. 336.

(*n*) *Ib.*, tit. Highways.

(*p*) *R. v. Woodland*, 2 East, 161.

(*r*) *Cowp.* 451.

(*s*) 3 T. R. 480.

(*y*) *Lewis v. Branthwaite*, 2 B. & Ad. 437.

(*a*) *Graunt's Case*, 11 Co. 15.

II. Private Ways.

§ 103. What is a Private Way.
Right of Way.

103. Private Ways becoming Public.
103. Dedication of Way to the Public.

§ 102. Ways are either public or private, and these again are distinguished, according to the uses to which they are applied, into horseways, cartways, and footways. See further Dig. P. iii. tit. Highways.

I. Public Ways.

Public ways are either common ways or highways. A common way is such as leads from a village into fields, &c. ;(c) and this may be prescribed for. (d)

A highway is a way to a market or a great road, &c., common to all passengers, or more properly speaking a public passage for the Queen and all her subjects, whence called by distinction the "Queen's highway."

[*100] Whether it leads to a market-town or not it is a highway if common to all the people ;(c) so, a street is a highway ;(f) (1) so, a navigable river is to some purposes esteemed a highway ;(g) so, a bridge ;(h) so, a towing-path ;(i) so, a railway ;(k) (2) but a flight of stairs down to the Thames is not necessarily a highway. (l)

There may be a highway although it may be circuitous ;(m) and even, as it seems, although there be no thoroughfare. (n)

When a highway becomes foundeours or out of repair, the passengers may go on the adjoining land, even over sown corn ;(o) and such ways, termed outlets, are held to be part of the highway ;(o) but in order to make such way the Queen's highway, it was formerly necessary to have a writ of *ad quod damnum*, (p) which is now very rarely required, since the highways are regulated by act of Parliament.

Turnpike roads are highways, but every road where toll is taken is not necessarily a highway, for the law recognises "toll thorough," and "toll-traverse," the former of which is toll for passing over the private soil of another, (q) and the latter is a toll for passing through a highway. (q) Toll-

(c) R. v. Hornsey (Inhabs.) 10 Mod. 159. (d) Chichester v. Lethbridge, Willes, 71.

(e) Austen's case, 1 Vent. 189.

(f) R. v. Hammond, 10 Mod. 382; S. C., 1 Stra. 44.

(g) Fitz. Abr. tit. Challenge, 279, cited 10 Mod. 382.

(h) R. v. Saintiff, 6 Mod. 255.

(i) 2 B. & A. 648.

(k) R. v. Severn Railway Co., 2 B. & A. 646; Rowe v. Shilson, 4 B. & Ad. 726.

(l) R. v. Limehouse, 2 Show. 455. See also Drinkwater v. Porter, 7 C. & P. 181.

(m) R. v. Lloyd, 1 Camp. 261.

(n) Rugby Charity v. Merryweather, 11 East, 375, n. But see Woodyer v. Hadden, 5 Taunt. 138; Wood v. Veal, 5 B. & A. 454; S. C., 1 D. & R. 20, where that decision is questioned.

(o) Duncombe's case, 1 Roll. Abr. 390.

(p) Cro. Car. 266.

(q) Blount, Nom. Verb. Toll; 1 Sid. 454.

(1) Case of the Philadelphia & Trenton Rail Road Co., 6 Whart. 44.

(2) Bonaparte v. Camden, 1 Bald. 223.

traverse cannot be demanded without consideration ;(*r*) toll-thorough on the other hand may be demanded without *any consideration. (*s*) These [*101] two kinds of toll and also toll-turn, which is a toll on beasts returning from a market, a man have on his own ground and might have assize for them. (*t*)

The property in the soil of the highway is in the owner of the adjoining land, (*x*) who may maintain trespass for digging the ground of the highway, (*y*) (1) and also ejectment, for the sheriff may give him possession subject to the easement. (*z*) (2) To him also belong all trees upon it, (3) and all mines underneath, (*a*) and he may carry water under it. (*a*) (4) Hence it has been said that cattle should be driven directly along the highway, and not suffered to linger, for if they do any thing but pass and repass it is a trespass, (*b*) for the property in the soil being vested in the owner, a lawful user may be shewn. (*c*) So, it has been held that trustees of a turnpike road have not the soil of the road vested in them, so that they can give consent to the diverting a public footpath into it, without a special clause in the statute vesting the right in them. (*d*) (5) although by the 3 Gt. 4, c. 126, ss. 86 *et seq.*, they are authorized to sell roads become useless, reserving mines and minerals to the owner.

The owner of the soil is generally understood to be the owner of the close adjoining, to whom the highway itself, *ad medium filum viæ*, belongs, and consequently the presumption *prima facie* is, that the land belongs to the owner on each side ;(*e*) and the rule is the same whether the owner be a freeholder, leaseholder, or copyholder ;(*f*) so the presumption is that the strips of land at the sides of the road *belong to such owner, (*g*) but acts of ownership on the part of the lord of the manor may be [*102] admitted to repel such presumption ;(*h*) so, if the narrow slips lie contiguous to or communicate with open commons, the presumption in favour of the

(*r*) *R. v. Boston (Corp.)* 1 W. Jo. 162 ; *Hasfert v. Wells*, 1 Mod. 47 ; *S. C.*, nom. *Heshord v. Wells*, 1 Sid. 451 ; *London (Corp.) v. Hunt*, 3 Lev. 47 ; *Warrington v. Moseley*, 4 Mod. 319 ; *Wilkes v. Kirby*, 2 Lutw. 1519 ; *Yarmouth (Mayor) v. Eaton*, 3 Barr. 1402. And see *Pelham (Id.) v. Pickersgrill*, 1 T. R. 669 ; *Trueman v. Walgham*, 2 Wils. 298.

(*s*) *Crispe v. Bellwood*, 3 Lev. 421 ; *Colton v. Smith*, Cowp. 47.

(*t*) *Webb's case*, 8 Co. 45.

(*x*) 2 E. 4, 9 ; 8 E. 4, 9 ; 8 H. 7, 9 ; 2 Inst. 705.

(*y*) 8 E. 4, 9 ; *Goodtitle v. Alker*, 1 Burr. 133.

(*z*) *Lake v. Shepherd*, 2 Stra. 1094.

(*a*) *Goodtitle v. Alker*, sup.

(*b*) 10 E. 4, 7 ; *Br. Trespass*, pl. 321.

(*c*) *Doveston v. Payne*, 2 H. Bl. 531.

(*d*) *Davison v. Gill*, 1 East, 61.

(*e*) *Stevens v. Whistler*, 11 East, 51 ; *Doe v. Pearsey*, 7 B. & C. 304 ; *S. C.*, 9 D. & R. 903 ; *S. C.*, 5 D. & R. 273 ; *Cooke v. Green*, 11 Price, 736.

(*f*) *Doe v. Pearsey*, sup.

(*g*) *Steel v. Prickett*, 2 Stark. 463.

(*h*) *Anon., Loft*, 353 ; *Doe v. Kemp*, 7 Bing. 332 ; *S. C.*, 5 M. & S. 173.

(1) Or for landing passengers from a ferry over a navigable stream, on the terminus of a highway, *Chess v. Manown*, 3 Watts, 219 ; *Peebles v. Kittle*, 2 Johns. 363.

(2) *Alder v. Murdock*, 13 Mass. 256.

(3) *Chambers v. Furry*, 1 Yeat. 167.

(4) *Perley v. Chandler*, 6 Mass. 454.

(5) And though they may erect a toll house within their limits, *Ridge v. Stoeve*, 2 W. & S. 513, yet they cannot use it for any other purpose than is essential to the use of the road, *Fisher v. Coyle*, 3 Watts, 498 ; and on the abandonment of the house as a toll house, it becomes a public nuisance, and any one may abate it, *Philadelphia Turnpike v. Rogers*, 2 Barr. 114.

landowner fails or is much narrowed ;(i) so, where such strip had been commonly reputed waste.(k)

As to the property in trees growing in the highway the old text writers appear to be not agreed, some contending that they belong to the lord of the manor, and others to the freeholder.(l) In Brownlow, 42, it is laid down, that to the owner of the soil on both sides of the way of common right belong the trees that grow in the lane, whether he be lord or freeholder, although it seems that the question will turn very frequently on the usage of taking the profits of the trees.(m)

By the 7 & 8 G. 4, c. 24, s. 18, minerals under the road are made by virtue of the act to belong to the original proprietor of the land, who shall have the liberty of working the same in such manner as is usual for carrying on works of that kind ; and by the 4 G. 4, c. 95, s. 75, the right of pasturage is reserved to those who are entitled to the same ;(n) and by the General Inclosure Act it is provided that the grass and herbage growing on the roads that are set out shall forever belong to the proprietor of the lands adjoining on both sides the way.

It is settled, that, of common right, the parish, where the highway is, ought to repair.(o)(1) And no agreement whatever with any person can relieve the parish from this common-law liability ;(p) and if there be any one who is bound to repair, but becomes insolvent, the justices may cause [*103] the *deficiency to be levied on the rest of the inhabitants ;(q) so, where certain inhabitants of a township were exempted from the repair of the new roads, the burthen was thrown upon the rest of the parish ;(r) but certain districts or individuals may be bound to repair, as a vill,(s) or a hundred.(t) So, a hamlet may be charged by immemorial prescription ;(x) or a township may be chargeable by prescription for the maintenance of all ways within their boundary ;(y) and mere usage without the averment of any consideration will suffice to bind such districts ;(z) but it seems doubtful whether one parish may be bound to repair a way within another parish.(a)

Bridges, though deemed to be highways, must be repaired by the county ;(b) and by the 22 H. 8, c. 5, s. 9, the county is bound to repair the highway at the ends of bridges to the extent of three hundred yards distance from the end, which seems to have been the common law,(c) see further as to bridges, Dig. P. ii. tit. Bridges.

Individuals may be bound to repair from different causes, as by prescrip-

(i) *Grove v. West*, 7 Taunt. 39. Holt, 463.

(k) *Headlam v. Headley*, Holt, 463.

(l) *Kitch.* 68 ; *Br. Abr. Lecte.*, pl. 3.

(m) *Pelham v. Wiatt*, 1 Roll. Abr. 392.

(n) See Dig. P. iii. tit. Highways.

(o) 1 Vent. 90 ; 1 *Ld. Raym.* 725 ; 2 *Mod.* 409.

(p) 1 *Ventr.* 90.

(q) 1 *Ld. Raym.* 725.

(r) *R. v. Sheffield (Inhabs.)* 2 T. R. 106.

(s) 27 *Ass. pl.* 44, (31.)

(t) *R. v. Yarton (Inhabs.)* 1 *Sid.* 140.

(x) *Sty.* 163.

(y) *R. v. Ecclesfield (Inhabs.)* 1 B. & A. 348 ; *R. v. Machynlleth*, 2 B. & C. 166.

(z) *R. v. Hatfield (Inhabs.)* 4 B. & A. 75.

(a) *Anon.*, 12 *Mod.* 409 ; *R. v. St. Giles, Cambridge (Inhabs.)* 5 M. & S. 260.

(b) 13 *Co.* 33.

(c) *Br. Abr., Presentment*, pl. 23 ; 2 *Inst.* 705. See also *R. v. Yorkshire (W. Rid.)* 7 *East*, 588 ; *S. C.*, 5 *Taunt.* 284 ; *S. C.*, in error, 2 *Dow.* 1.

(1) But the charge of repairing a road cannot be thrown on the public by a mere dedication, *Union Canal v. Pinegrove*, 6 W. & S. 563.

tion, tenure or inclosure. A party cannot be held liable by prescription, unless it be in respect of some consideration as the taking of toll or other profit, for the act of the ancestor cannot charge the heir without profit; ^(d) but a corporation may be bound by prescription without consideration; ^(e) but the occupier is bound to cleanse the dikes and ditches adjoining to his land without *prescription, ^(g) and this part of the common law is [*104] confirmed by the statute. ^(h)

A private person may likewise be bound by reason of his tenure; ⁽ⁱ⁾ and so his alienee; ^(k) and if the lands come into the hands of the Crown, yet the obligation or duty continues, ^(l) but the occupier and not the owner is liable; ^(m) and if the owner allow his land to lie fresh, he will not be excused from repair. ⁽ⁱ⁾

A party may likewise be bound to repair by reason of an inclosure of the land on either side of the highway, for by this means he deprives the public of their common-law right to go upon the adjacent land in case the road be foundeours and out of repair. ⁽ⁿ⁾ If a person inclose land on one side, the other side being anciently inclosed, he shall be compelled to repair all the way, but if there be no ancient inclosure he will be obliged to repair only half the way. ^(o) If the party neglect to repair, the passengers may make gaps in the inclosure, and go upon the land to avoid the bad road, ^(p) and the Court in one case ordered an inclosure to be prostrated until the road was repaired; ^(q) and the like law prevails in case a party encroaches on a highway, for he is bound to repair it until the encroachment is removed; ^(r) but the bare removal will not discharge one who is bound to repair by reason of tenure, because in that case he is always bound. ^(r) But the obligation to repair by reason of inclosure or encroachment extends only to inclosures made by the party, not to those made by the act of the law, as *under an inclosure act. ^(s) As to the making, repairing, and managing of [*105] highways and turnpike roads, see Dig. P. ii. tit. Highway.

II. Private Ways.

103. A private way is said to be such as goes to a church, or to the common fields of a town, or to a private house, or to a particular village which terminated there; and it is so called because it is for the particular benefit of the inhabitants of such place only, and not for all the queen's subjects; and the right, which may be claimed by particular persons to use such way, is an incorporeal hereditament known by the name of a *Right of Way*, as to which see further, post, § 360 *et seq.* But whether a way be a private way or a highway depends much upon reputation. ^(t)

^(d) 13 Co. 33; Sty. 400. See also R. v. Skinner, 5 Esp. 219. ^(e) 13 Co. 33.

^(g) 8 H. 7, 5; Bro. Nuisance, pl. 23. ^(h) See Dig. iii. tit. Highways.

⁽ⁱ⁾ Palm. 339. ^(k) R. v. Buckeridge, 4 Mod. 48.

^(l) R. v. Buecleugh (Duchess,) 1 Salk. 358; S. C., 6 Mod. 150.

^(m) Palm. 339; 2 Roll. Rep. 412; Hoskins's case, Godb. 400; R. v. Watts, 1 Salk. 357; Foster's case, 4 Vin. Abr. 504.

⁽ⁿ⁾ Duncombe's case, Cro. Car. 366; Henn's case, W. Jo. 296.

^(o) Anon., 1 Sid. 464.

^(p) Henn's case, sup.

^(q) R. v. Hillarsden, 1 Keb. 894. See also R. v. Hatfield, (Inhabs.,) 4 B. & A. 75.

^(r) R. v. Stoughton, 2 Saund. 169.

^(s) R. v. Flecknow (Inhabs.,) 1 Burr. 461.

^(t) 1 Vent. 183. See also Senhouse v. Christian, 1 T. R. 578.

A private way may become public either by act of Parliament, as by inclosure acts, or by its presumed dedication to public use. As to what constitutes a dedication has been a matter of some question. At first it seems to have depended upon the length of time that the road had been left without any bar or other obstruction,^(u) but the intention has since been considered as the rule;^(x)(1) but the tenant cannot bind the inheritance in cases of this kind;^(y) so, if the dedication be not made openly, and with a deliberate purpose, it will not be admitted;^(z) so, where it was proved that a bar had been put up, the right of way was negatived;^(a) so, where the owner was compellable to make an occupation road for particular persons, this was held to rebut the presumption of a dedication;^(b) but where a place was altogether [*106] left without bar, or chain, or any other mark *of private property, this was declared to be a public road.^(c) As to whether there can or cannot be a partial dedication of a way, see 2 M. & S. 263, 1 Campb. 263, n., 7 B. & C. 266;⁽²⁾ but if a general grant be once made, the grantor cannot resume his rights to the hinderance of the public, and a highway cannot be changed or diverted without the queen's license or the authority of Parliament.^(d)

SECTION XI.

WATER.

§ 104. Under what name Water passes.

I. *Sea.*

§ 105. Rights connected with the Sea.
Limits of the Admiralty or Common
Law Jurisdiction.
Property in the Soil of the Sea.
Ground Derelict.

§ 105. Alluvion.
Avulsion.
Fishing in the Sea.
Wreck, &c.
Right of bathing in the Sea.

II. *Rivers.*

106. Definition.

| 106. Public or Private.

1. *Public Rivers.*

107. What a navigable River.
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Property in the Beds of Rivers.
Banks the Property of the Owner.

107. No Common-law Right to Towing-
paths.
Rights of the Crown.
Derelict Lands, &c. in Rivers.

107. Eyots in Rivers.

(u) Rugby Charity v. Merryweather, 11 East, 376.

(x) Woodyer v. Hadden, 5 Taunt. 126, recognised in Wood v. Veal, 5 B. & A. 457.

(y) Wood v. Veal, 5 B. & A. 457.

(z) Roberts v. Karr, 1 Campb. 262, n.

(a) Lethbridge v. Winter, Id. 263, n.

(b) R. v. St. Benedict (Inhabs.), 4 B. & A. 447.

(c) R. v. Lloyd, 1 Campb. 260.

(d) R. v. Warde, Cro. Car. 266; S. C., 1 Anders. 344.

(1) Hence there may be a practical dedication to the public, as of a right of passage to and from a public building, which will not authorise an adjoining proprietor to open windows or doors on the way; and that intent is to be inferred from their acts. *Gowen v. The Exchange*, 5 W. & S. 141.

(2) See 105, n. 1.

2. Private Rivers.

§ 108. Incidents to private Rivers.
 Fisheries of different Kinds.
 Common Fishery.
 Free Fishery.
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§ 108. Rateability of a Fishery.
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 109. Tolls, when demandable or otherwise.
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III. Canal, Docks, &c.

110. Property in the Soil,

| 110. Shares in River and Canal Cos.
 110. Damage to Locks, &c.

*IV. Ponds, Decoys, &c.

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111. Fish-ponds.
 Property in the Fish.
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112. Decoys, how protected.
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V. Sewers.

113. Definition of a Sewer.
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 Jurisdiction of the Commissioners of
 Sewers.
 Land rateable for Repairs of Sewers.

113. Obligation of Individuals to repair by
 reason of Tenure.
 Parties not to be assessed, when.
 When the whole Level is bound.

104. Water, in the general sense of the term, is comprehended under land, and was not demandable by the name of water in a *præcipe*, (before the 3 & 4 W. 4, c. 27, abolishing that writ, see Dig. P. iii. tit. Limitations,) but the land whereupon the water flowed was demandable as so many acres *terræ aquâ coopertas*; (e) so, if a man be seised of a river, and by deed grants *separalem piscariam* in the same, and makes livery of seisin *secundum formam chartæ*, the soil does not pass [but on this point see further, post, § 108(e)] nor the water, for the grantor may take water there; and if the river become dry, he may take the benefit of the soil; (e) for the same reason, if a man grant *aquam suam*, the soil shall not pass, but the piscary within only; (e) but *stagnum* (a pool) consists of land and water, and therefore by that name land, as well as water, will pass; so, by the name of a gulf or deep pit, land and water will pass. (e)

Water, like land, is distinguishable into different parts, as the sea, rivers, docks, canals, ponds, and sewers, to each of which are attached different rights and incidents; to these may be added a watercourse or the use of running water, which being an incorporeal hereditament demands a distinct consideration in its proper place.

*I. The Sea.

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105. The sea is open to all the queen's subjects for all lawful purposes,

(e) 1 Inst. 4, a.

it being called "the great highway of the world," and therefore common to all; (f) but this general right may be restrained by particular rights acquired either by grant from the Crown, or prescription which supposes a grant, or by custom. The matters connected with the sea are the jurisdiction to be exercised on the ocean as a municipal right, the property in the soil of the sea itself, and herein of land derelict, alluvion, and islands arising therein, the right of fishery, and of taking wrecked goods, and lastly the right of bathing in the sea.

That arm or branch of the sea which lies, as Lord Hale observes, within the *fauces terræ*, where a man may discern between shore and shore, is within the common-law jurisdiction, that is, within the jurisdiction of the sheriff or coroner; that part which lies without, the main sea or the high sea, (g) is within the sole jurisdiction of the Admiralty: so, below the low water mark the admiral has the sole jurisdiction; but between the high water mark and the low water mark the common law and the admiral have *divisum imperum* interchangeably, *scil.* one *super aquum* and the other *super terram*. (h) These distinctions, so far as regards judicial proceedings, are of less importance now than they were formerly, in consequence of the statutory provisions respecting the admiral's jurisdiction; (see Dig. P. i. tit. Admiral, Admiralty;) but so far as regards private rights there may still be questions arising out of this distinction, as, where a contract took place in the Thames adjoining St. Katharine's, prohibition was granted. (i)

It is agreed, that, as the queen has the sovereign dominion over the sea, she has the right of property in the soil; hence it follows that what was the queen's when covered *with water becomes hers also when the [*109] waters have left it; (k) therefore in one case where a quantity of ground was left by the sea, and the question was whether it belonged to the King by his prerogative, or whether he whose grounds were adjoining should have it, it was adjudged that if the sea gradually decreases, the ground shall not belong to the King; *sed secus*, where a great quantity which was drowned before is left. (l) So, if the sea-marks were gone, so that it could not be known if ever there was land there, the land gained from the sea was held to belong to the King; but if the sea covered the land at the flux of the sea, and retreated at the reflux, so that the sea-marks were known, such land should belong to the owner. (m) So, lords of manors may claim lands derelict by grant or prescription; (n) but they cannot prescribe to have lands beyond the low water mark because a subject can have no use of such, yet lands between the high and low water mark may be prescribed to belong to a manor, because such lands are dry every twelve hours in every day; (o) so, grants may be made of land to be recovered, but in this it is to be understood that the land must be reduced into possession within a reasonable time. (p)

Alluvion, by which is understood the secret accession of soil to other soil,

(f) Per Best, C. J., *Blundell v. Catterall*, 5 B. & A. 274.

(g) *Hale de Jure Maris*, 10.

(h) *Sir H. Constable's case*, 5 Co. 107.

(i) *Leigh v. Burley*, Ow. 122.

(k) *Callis on Sewers*, 47. See also *Hale de Jure Maris*, c. 4; *Davis*, 56; *Constable's case*, 5 Co. 108 a.

(l) *Abbot of Ramsey's case*, 3 Dy. 326.

(m) *Corporation of Rumney's case*, 3 Dy. 326, pl. 2, in marg.; see also 1 Kcb. 301; 2 Vent. 208.

(n) 26 Vin. Abr. 574, pl. 3.

(o) *Callis*, p. 49.

(p) *Att.-Gen. v. Richards*, 2 Anstr. 603.

produced by the sea casting up sand and earth so as to make fresh soil, belongs not to the queen, but to the owner of the ground to which it attaches itself, on the same principle as lands gradually derelict belong to the subject; (g)(1) and it is said by a writer of authority that a grant of a manor or land contiguous to the sea, **unà cum maritimis incrementis*, will [*110] pass the right to alluvion, though not to lands derelict.(r)

There is also a distinction taken between alluvion which is an imperceptible increase, and avulsion which is an accession of land by its breaking off from other land; in this latter case if the direption be sudden, and it be unknown from what land it is severed, it will belong to the Crown; but if the owner of the land from which it is torn off be known, it shall belong to him.(s) So, in respect to islands rising in the sea, they belong *primâ facie* to the queen as universal occupant; (t) but if that part of the sea where the island rises happens to belong to a subject, that forms an exception to the rule of law, and may be claimed by the owner upon the general principle that a man shall be enabled to repossess himself of his land in all cases where he can establish his claim.(x)

A right of fishing in the sea is properly a public right,(2) the exercise of which is regulated by statutory provisions for the benefit of the public; (see Dig. P. i. tit. Fish, Fisheries); but in this as in other cases of public rights there may be a claim to a private right grounded on an immemorial grant or prescription as to common of fishery.(y)

The right of taking goods wrecked, royal fish, and swans may all be vested in subjects as royal franchises, for which see further, post, under that title.

The right of bathing in the sea has, after much discussion and deliberation, been determined (though not unanimously) not to be a common law right; (z) and in all cases, if public decency is violated, it is an indictable offence.

(g) *Hale de Jure Maris*, p. 29. See also *R. v. Yarborough* (Lord), 3 B. & C. 91; S. C. 4 D. & R. 790; S. C., affirmed in the House of Lords, 5 Bing. 163; S. C., 2 Bligh, N. S., 147; S. C., 1 Dow, N. S. 176; *S. P. Scrutton v. Brown*, 4 B. & C. 484, where the distinction between derelict land and alluvion is fully recognised.

(r) *Hale de Jure Maris*, 17, 18.

(s) *Fleta*, l. 3, c. 2, s. 6. See also *Bract*, l. 2, c. 2, s. 2.

(t) *Callis*, 44.

(u) *Fleta*, l. 3, c. 2, ss. 6. 9; *Britt*, 86 b; *Callis on Sewers*, 44, 45.

(x) See post, § 107; *Blundell v. Catterall*, 5 B. & A. 274.

(y) *Blundell v. Catterall*, 5 B. & A. 268.

(z) *R. v. Crunden*, 2 Campb. 89.

(1) *Ingraham v. Wilkinson*, 4 Pick. 273, and the right of the owner is defined by extending the lines over the alluvion in the same direction that they reach the bank of the river. *Ball v. Slack*, 2 Wharton, 540. And the older title prevails in case of a collision. *Wharton v. Morris*, per Sergeant, J., at Nisi Prius, S. C. Penna. The same rule prevails in Louisiana under the civil law. *New Orleans v. The United States*, 10 Pet. 717. But it was there held under a peculiar law existing there, that such alluvion in front of an incorporated city or town was public property vested in the city. S. C., *Cochran v. Foot*, 7 Martin, N. S. 622. This rule does not prevail in Pennsylvania, *Ball v. Slack*, ante.

(2) *Adams v. Pease*, 2 Conn. 483.

[*111]

*II. **Rivers.**

106. A river is defined to be a running stream, pent in on either side with walls and banks, and it bears that name as well where the waters flow and reflow, as where they have their current one way.

Rivers are either public or private. A public river, otherwise called a *navigable river*, is where there is a common navigation exercised. A private river is where there is no public right of passage.

1. *Public Rivers.*

An ancient river, which has been navigable from time immemorial, or which has been declared to be so by act of Parliament, is unquestionably a public navigable river ;(b)(1) and *primâ facie* a river which flows and reflows, and is an arm of the sea, is common to all ;(b) but in *Lynn (Mayor, &c.) v. Turner*(c) this was not admitted, and the public right to navigate the stream was denied ;(d)(1) however, in *Miles v. Rose*,(e) the decision was in favour of the public right ; but whether a river be navigable or not is a question of fact for a jury.(f)

107. The rights in public rivers are much the same as those enjoyed in the sea. As a rule, the soil of ancient navigable rivers, where there is a flux and reflux of the sea, belongs to the Crown ;(g) but the banks of such rivers, together with the trees, &c., belong to the owners of the adjacent grounds, although they cannot justify digging or casting them down,(h) and it is the same with the sea banks.(i) The soil of other streams belongs to the sub-
[*112] ject,(2) that is to the owners of the adjacent grounds, to each respectively, as far as the middle of the stream ; public rivers, therefore, so far as concerns the flowing and reflowing of the tide, and as they participate of the nature of the sea, are denominated royal streams, and so far as they are navigable by all her Majesty's subjects, they are properly considered as highways, with this difference, however, that if a way be foundeious and out of repair, the public have a right to go on the adjoining land, but if a river should happen to be choaked up with mud, this would not give the

(b) 22 Ass. pl. 93 ; cited by Holt, C. J., 1 Mod. 105.

(c) Cowp. 86 ; S. C., *sembl.*, Loffl, 556.

(d) *Ib.* ; see also 4 B. & C. 602.

(e) 5 Taunt. 705 ; S. C., 1 Marsh. 313.

(f) *Vooght v. Winch*, 2 B. & A. 662.

(g) *R. v. Trinity House*, 1 Sid. 86 ; S. C., 1 Keb. 300.

(h) *Callis*, 73.

(i) *Id.* 74.

(1) The power to navigate is said to constitute the distinction, in *Palmer v. Mulligan*, 3 Caine, 319. *People v. Platt*, 17 Johns. 211.

(2) There is a distinction taken in some of the States with respect to rivers, on the ground that the English rule is not applicable under the peculiar circumstances of this country ; and it has been held, that large navigable streams above the flow of the tide, are subject to the rules of property, in case of tide waters. *Carson v. Blazer*, 2 Bin. 475. *Cates v. Wadlington*, 1 McCord, 580. *Wilson v. Forbes*, 1 Des. 30. In Virginia the rule has been adopted by statute for the western waters. But there are other States which recognize the common law to its fullest extent ; and consider that the soil of navigable rivers above tide water, however large, belongs to the owners of the adjoining banks, and the public have but a right of passage. *People v. Platt*, 17 Johns. 211. *Hooker v. Cummings*, 20 ib. 100. *Adams v. Pease*, 2 Conn. 483. *Gavit v. Chamaers*, 3 Ohio, 496. *Walters v. Lilly*, 4 Pick. 145.

public a right to cut another passage through the adjoining lands. *(k)* On this principle it has been decided, in more than one case, that there is no common-law right to towing-paths on the banks of navigable rivers, and that the right can be claimed only by custom. *(l)* although in *R. v. Cloworth (Inhab.)* *(m)* it is said that if one have land adjoining on a navigable river, every one that uses that river has, if occasion be, a right to a way by the brink of the water over that land, or farther in if necessary.

On the same principle, no port, wharf, or quay can be erected without the license or charter of the Queen, nor is there any general right to unload merchandise on the shore of the sea or the banks of the rivers; *(1)* so, not to stake nets, nor to take away sand or stone. *(n)* But these rights may belong to the subject by grant or prescription, and the right of the Corporation of London to drive piles into the bed of the river Thames was vindicated on this ground; *(o)* so, on the same ground the Trinity House may take gravel and sand. *(p)*

So, the queen possesses certain rights in rivers as that no one should set up a ferry without prescription or a charter, unless it be for the use of his own family; also a right to bar fishing or fowling for a certain time; *(q)* and also a jurisdiction to remove nuisances by a commission of sewers. *(r)*

*The law respecting lands derelict by the recess of the sea applies also to navigable rivers; if a stream deprive a man of his ground by [*113] making a channel, and it afterwards return to its ancient course, the original ownership will not be lost if it can be ascertained; *(s)* and the same in regard to alluvion; but it is said that if the field of a man becomes detached by the force of the stream, and attaches itself to the soil of another, and remains so a sufficient time for trees to grow thereon, the trees shall be the property of the latter, on the principle that trees belong to the person in whose hand they are first planted; *(t)* yet it seems that by custom a river may form the boundary of lands, whatever course it may take, as in the Case of the Severn below Gloucester. *(x)*

As to eyots or small islands in rivers the rule of law seems to be, that if it rise in the middle of a river, it belongs to the owners of the land on either side, according to its breadth near the banks, *(y)* and therefore if it lies nearer to one bank than the other, so much more will belong to the owner near to whose bank it lies than to the other. *(z)*

By the Malicious Injuries Act unlawfully destroying any sand-bank or sea-wall, or the bank or wall of any river, canal, or marsh, whereby any land should be overflowed, is declared a felony punishable with transportation for life or seven years.

(k) Ball v. Herbert, 3 T. R. 263.

(l) Id. 259, citing Zangers v. Whiskard and Vernon v. Prior. See also Pierce v. Fauconberg (Id.), 1 Burr. 292.

(m) 6 Mod. 163.

(o) R. v. Smith, 1 Dougl. 441.

(q) Hale de Jur. Mar. 6.

(s) Fleta, lib. 3, c. 2, s. 10.

(x) Hale de Jure Maris, 6.

(z) Fleta, lib. 3, c. 2, s. 6; Bract. lib. 2, c. 2.

(n) Blundell v. Catterall, sup.

(p) R. v. Trinity House, sup.

(r) Callis, passim.

(t) Holder v. Coates, see ante, § 96.

(y) Fleta, lib. 3, c. 2, s. 6.

As to fisheries and tolls, in respect of water, see *infra*, § 108; and as to obstructions to rivers, see *post*, INJURIES TO THINGS REAL.

2. *Private Rivers.*

108. Private rivers are not navigable, and the soil most commonly belongs to an individual or to the owner of the adjacent land, on either side.^(a) To such rivers belong in a particular manner the private right of water known [*114] by *the name of a watercourse, and some other easements connected with water, of which see further, *post*, § 398.

Among the incidents to private rivers in common with navigable rivers, are fisheries,⁽¹⁾ tolls, and rateability, &c.

A fishery is either a liberty or right of fishing arising by reason of the proprietary of the soil, as a man's right to fish in his own water, which is incident to his enjoyment of the land covered with water,^(b) (2) or it is a liberty without the soil or severed from the land, of which there are different kinds, as—1. Common fishery, a right of fishing common to all, as a fishery in the sea; 2. Free fishery, or an exclusive right to fish in any public water, as in an arm of the sea; (3) 3. Several fishery, a right to fish in a private water, either exclusively or in conjunction with the owner of the soil; 4. Common of piscary, or a liberty for one or more to fish in the water of another.

Although these distinctions are recognised in the books, yet the terms “common,” “free,” and “several” seem to be applied indiscriminately to fisheries either in public or private waters.^(c)

A common fishery, as above defined, is that which properly belongs to the sea and navigable rivers, it being a settled rule of law, that the sea and all navigable rivers are open to all her Majesty's subjects for the purpose of fishing; ^(d) (4) and there can be no prescription for a right to fish in the sea as annexed to certain tenements; ^(e) but there may be a right either by grants from the Crown, or by statutory provisions, for which see *Dig. P. i. tit. Fish, Fisheries*.

A free fishery, according to the above definition, ^(g) is like a free warren a royal franchise.^(h)

But as to what is to be understood by a several fishery the books are [*115] *by no means agreed, and it is said to be a point not yet quite settled.⁽ⁱ⁾ Lord Coke says, “A man may prescribe to have *separalem*

(a) See *ante*, § 106.

(b) *Hale de Jur. Mar.* 18 et seq.

(c) *Bract.*, lib. 4, c. 45, s. 4; 4 *H. 6*, 11, pl. 7; *F. N. B.* 889; *Fitz. Abr. Ass.* 422; *Cro. Car.* 554; 1 *Vent.* 122; *Carth.* 235.

(d) Lord Fitzwalter's case, 1 *Mod.* 106; *S. C.* 3 *Keb.* 242; *S. C.* 2 *Lev.* 139; 1 *Freem.* 414; *Royal Fishery in the River Bann*, *Dav.* 149; *Carter v. Murcot*, 4 *Burr.* 2162.

(e) *Ward v. Cresswell*, *Willes*, 265. See also 8 *E. 4*, 10, cited *Kitch.* 45.

(g) See 2 *Comm.* 39.

(h) See *post*, § 629.

(i) *Kinnersley v. Orpe*, 1 *Dougl.* 56.

(1) Exclusive in the owners of land on rivers above tide water. *Adams v. Pease*, 2 *Conn.* 483.

(2) *Waters v. Lilly*, 4 *Pick.* 147.

(3) But every presumption is against it, *Gould v. James*, 6 *Cow.* 376; and in *Melvin v. Whiting*, 7 *Pick.* 81, it was said a free fishery did not mean an exclusive one.

(4) *Gould v. James*, 6 *Cow.* 369. *Adams v. Pease*, 2 *Conn.* 483.

piscariam in such a water, and the owner of the soil shall not fish there, but if he claim to have *communiam piscariæ* or *liberam piscariam*, the owner of the soil shall fish there.”(k) On the other hand, in *Kemp v. Smith*,(l) it is said that he who has a several fishery is owner of the soil, and therefore it is a good plea in an action brought by him, that it is *liberam piscariam*. In *Seymour v. Ld. Courtenay*,(m) it was ruled that a grant of fishery, with the exception of oysters, and a reservation of a right to take fish for the grantor’s own table constituted a several fishery; and in this case the Court declined giving any opinion on the point, whether ownership of the soil be essential to a several fishery or otherwise; and it was added, “that a partial independent right, or a limited liberty, not derogating from the right of another, is not inconsistent with a several fishery; and therefore, although a man has the liberty of taking a particular species of fish or a certain quantity of fish, yet another having the liberty of taking fish at all times and for all purposes should still be deemed to have a several fishery;(n) but it has in a subsequent case been held that where a man has a several fishery, the presumption is that he has the soil, and that presumption is conclusive, if not opposed.(n)

Although, *primâ facie*, every subject has a right to take fish upon the sea-shore between the high and low water mark, such general right may be abridged by the existence of an exclusive right in some individual,(o) and the Crown may grant a several fishery in a navigable river, or in an arm of the sea.(p) see further, post, § 629. So there may be *either [*116] reservations by the owner of the soil, or limited grants by him, such as weirs, &c. in certain rivers;(q) and where a person has a right, under ancient deeds to have a weir across a river for taking fish, if it appear that such weir was heretofore made of brushwood, through which the fish might escape into the upper part of the river, he cannot convert it into a stone weir, whereby the possibility of escape, except in times of extraordinary flood, is debarred.(r) So, it has been held that if one have a piscary in any water, he has no power to land without the assent of the owner of the freehold, *Ipswich (Inhabs.) v. Browne*;(s) and in this case it was laid down that in every ferry the land on both sides ought to belong to the owners of the ferry, who otherwise could not land on the other side; but this latter point has been since overruled,(t) and it seems also, that evidence of an enjoyment of a landing place for the space of twenty years, by one having a fishery, is sufficient to presume a grant;(x) and it has been said that those who are fishers in the sea may justify going on the adjoining land, for such fishery is for the commonwealth;(y) but this is denied in *Ball v. Herbert*.(z)

A mere right of fishery, without the ownership or occupation of the soil, being an incorporeal hereditament, is not within the 43 El. as the subject of a rate;(a) but a several fishery when shewn to be identified with the land is liable to be rated.(b)

(k) 1 Inst. 122.

(l) 2 Salk. 637; S. C. 4 Mod. 186; Skinn. 342; Holt, 322.

(m) 5 Burr. 2814.

(n) *Partheriche v. Mason*, 2 Chit. 662.

(o) *Bagott v. Orr*, 2 B. & P. 472.

(p) *Carter v. Murcot*, 4 Burr. 2162; *Oxford, (Mayor, &c.) v. Richardson*, 4 T. R. 239.

(q) 1 Mod. 106; *R. v. Ellis*, 1 M. & S. 652.

(r) *Weld v. Hornby*, 7 East, 195.

(s) Sav. 11.

(t) *Peter v. Kendal*, 6 B. & C. 703.

(x) *Gray v. Bond*, 2 B. & B. 667.

(y) 8 E. 4, 18, 19.

(z) 3 T. R. 263.

(a) *R. v. Ellis*, 1 M. & S. 665.

(b) *Id.* 652.

Fish, whether taken in the sea, or in rivers public or private, or in private waters, are not titheable except by custom.(c) As to the preservation of fish in rivers, time of taking and sale of fish, fish-markets, importation or exportation *of fish, and regulation of fisheries in general, see Dig. P. i. tit. Fish, Fisheries.

109. As a rule the sea and navigable rivers are not subject to toll, because by Magna Charta and other statutes every one has a right to go and come upon the sea without impediment;(d) and therefore no duty can be imposed, in respect of the user of such waters, without the license of the Crown. So that, although a man may have trespass for unloading on his grounds, yet he may not take anything as a certain common toll.(e) unless a consideration be shewn, as coming into a quay or wharf, &c., when a toll may be demandable;(g) for toll-thorough, whether on the land or on the water, is against common right, and cannot be supported without a consideration;(h) but toll-traverse, which applies to private waters, may be demanded, because it in itself supposes a consideration;(i) therefore a custom of demanding a toll for the repair of a port has been held good, for the making a port is a consideration.(k) So, a toll for weighage has been supported, where the party had also the liberty of bringing the goods into a port;(l) and the owner of a port may have a toll by prescription, without alleging any consideration;(m) so, for the same reason, a toll for measurage has been supported;(n) so, for quayage;(o) so, for wharfage.(p)

The law of toll-thorough, as above laid down in respect of ports and harbours of the sea (see supra,) applies also to navigable rivers, where the toll cannot be supported without shewing a consideration, *Haspurt v. Wills*,(q) [*118] **Nottingham (Mayor, &c.) v. Lambert*,(r) where, for want of shewing a consideration, the toll could not be supported; on the other hand, in *R. v. Boston (Corpor.)*,(s) the consideration of repairing a bridge was held sufficient; and in *Steinson v. Heath*,(t) which was a case of toll-traverse, it was held that no consideration need be shown.(u)

The taking of toll in respect of ancient water mills rests on custom, and if more toll be taken than what the custom warrants, the miller is punishable for extortion.(x)

Tolls are not *per se* rateable to the poor, yet when connected with land they are so.(y) See further Dig. P. iii. tit. Poor. As to tolls imposed by Parliament, the amount and mode of imposition is regulated by the Act.

(c) *Noy*, 108; *Long v. Direell*, 1 Roll. Abr. 636; *Duves v. Huddleston*, Cro. Car. 339; *Anon.*, 1 Vent. 5; *Scarborough*, (Earl) v. *Hunter*, Bunb. 43; S. C., 2 Gwill. 621; *Austen v. Nicholas*, 2 Gwill. 616. (d) 1 Mod. 105.

(e) *Hale de Port*, 51, recognised in 5 B. & A. 298.

(g) *Willes*, 115.

(h) 22 E. 3, 58, cited *Nottingham*, (Mayor) v. *Lambert*, *Willes*, 114.

(i) *Ib.* See ante, § 102.

(k) *Vinkensterne v. Ebdon*, 1 Ld. Raym. 334; S. C., 1 Salk. 248.

(l) *London*, (Mayor, &c.) v. *Hunt*, 3 Lev. 37; S. P., *Exeter*, (Mayor, &c.,) 2 Wils. 95.

(m) *Wilkes v. Kirby*, 2 Lutw. 1519.

(n) *Yarmouth*, (Mayor, &c.) v. *Eaton*, 3 Burr. 1402.

(o) *Sargent v. Reed*, 2 Str. 1228; S. C., 1 Wils. 91.

(p) *Colton v. Smith*, 1 Cowp. 47.

(q) 1 Mod. 47; S. C., 1 Vent. 47; S. C., nom. *Heshord v. Wills*, 1 Sid. 454; S. C., 2 Keb. 624.

(r) *Supra.* (s) *W. Jo.* 162.

(t) 3 Lev. 400.

(u) See *supra.*

(x) *R. v. Burdett*, 1 Ld. Raym. 148. See ante, § 93.

(y) *R. v. Milton*, 3 B. & A. 112.

III. Canals, Docks, &c.

110. Canals, docks and other artificial waters erected under the sanction of the legislature are regulated in every respect by the provisions of the Act in each particular case, see Dig. P. iii. tit. Railroads and Canals; but the power thus given by the Act does not necessarily give the undertakers any interest in the soil, except of such land as they purchase; therefore the trustees of navigable rivers are held not to be rateable as the occupiers of land over which such rivers pass, although they are authorized to cleanse and enlarge the bed of the stream and to remove all obstructions to the navigation, they having no more than an easement in the river, which is an incorporeal hereditament, and no interest in the soil; (z) and the grant of a navigation passes only an easement; (a) so, where by a reservation in a *Canal Act the owners of the soil were authorized to work coal [*119] mines under the canal, held that the legislature having left to the owners the entire dominion and benefit of their property, the company who had the liberty of purchasing their rights, could not recover for any damages done to the canal, by working the mine; (b) yet shares in navigable rivers, canals and waterworks have heretofore in different cases been deemed real property; (c) but this is mostly provided for in modern Acts of Parliament by declaring all such shares to be personalty, see further, ante, § 83.

The throwing down, levelling, or otherwise destroying any lock, sluice, floodgate, or other work, on any navigable river or canal, is declared by the Malicious Injuries Act to be felony punishable with transportation for life. See Dig. P. i. tit. Malicious Injuries.

IV. Ponds, Decays, and other Private Waters.

111. Private waters have also certain rights attached to them, particularly as regards fish, wild fowl and mills. Any man may erect a fishpond, or water wherein fish are kept and maintained, it being a matter of profit and increase of victuals; (d) and there needs no privilege as for making a free warren; (e) but the lord of a manor may not make such a store-place for fish, as thereby to disturb the commonable rights of the commoner. (f)

A man's storepond is his several piscary, and he may claim the fish as *pisces suos*. (g) So, fish in a pond go to the heir and not to the executor; (h) and a man may have *an action of account for fish in a pond; (i) so, the renting of a fishing in a pond has been held to give a settle- [*120]

(z) *R. v. Mersey and Irwell Navigation Co.*, 9 B. & C. 95; S. C. 1 Man. & Ryl. 84; S. P., *R. v. Thomas*, 9 B. & C. 114; S. C., nom. *R. v. Avon Co.*, 4 Man. & Ryl. 23.

(a) *Aire and Calder Navigation Co.*, 9 B. & C. 820; S. C. 4 Man. & Ryl. 728.

(b) *Wyrly and Essington Canal Co. v. Bradley*, 7 East, 368.

(c) *Drybutter v. Bartholomew*, 2 P. Wms. 127; *Buckeridge v. Ingram*, 2 Ves. 662.

(d) 2 Inst. 199.

(e) *Anon.* 6 Mod. 183.

(f) *Reeve v. Digby*, Cro. Car. 495.

(g) *Pollexfen v. Crispin*, 1 Ventr. 122; S. C., nom. *Ashford v. Crispin*, 2 Keb. 757, recognising *Child v. Greenhill*, Cro. Car. 551; S. C., W. Jo. 440.

(h) *Grey's case*, Ow. 20. See also 21 H. 7, 26.

(i) 10 H. 7, 6. 30.

ment; (*k*) for fish in a fishery may be said to augment the inheritance, so as to increase the estimated value of the tenement in questions of settlement. (*k*)

By the Larceny Act unlawfully taking fish in any water, running through grounds which belong to a dwelling-house, is declared a misdemeanour; taking fish in other waters is made punishable with a fine of £5, and the tackle of persons unlawfully angling may be seized. See Dig. P. i. tit. Larceny. Stealing oysters from an oyster-bed is by the same act declared a larceny; and dredging for oysters in an oyster fishery is made punishable by a fine of £20.

By the Malicious Injuries Act breaking down or otherwise destroying the dam of any fishpond, or of any water which is private property or in which there is any private right of fishery with intent to destroy the fish, or putting any lime or noxious material therein with the like intent, is declared a misdemeanour punishable with transportation for seven years or imprisonment for two years. See Dig. P. i. tit. Malicious Injuries.

112. Ponds for the breeding and maintenance of wild fowl, which are called decoys, are under the special protection of the law, therefore the owner of such a decoy may have an action against any one shooting at, disturbing, or scaring the birds, (*l*) see further Dig. P. iii. tit. Game.

Water-mills like other mills are corporeal hereditaments, (see ante § 93;) and a covenant by a lessee to repair a mill has been held to run with the land. (*m*) With water-mills is essentially connected the law respecting water-courses, which being an incorporeal hereditament will be considered [*121] *more at large hereafter, see post, § 398 et seq.; and as to the disturbance of such rights, see post, § 427. By the Malicious Injuries Act breaking down the dam of any mill-pond is declared a misdemeanour, punishable with seven years' transportation or imprisonment for two years, and if the offender be a male, with a whipping, once, twice, or three times. As to burning or destroying mills themselves, see ante, § 93.

V. Sewers.

113. A sewer is properly a trench artificially made to carry water into the sea, but a commission of sewers comprehends in it much more than what was originally understood by the term. The protection of the land against inundations, which is the object of such commissions, was deemed a matter of great importance at an early period, although the first statute on the subject did not pass before the reign of Henry IV.; it was, however, followed by many other statutes in subsequent reigns, see Dig. P. iii. tit. Sewer.

The commissioners of sewers have jurisdiction over sewers communicating with a navigable stream, or with the sea above the point where the tide ebbs

(*k*) R. v. Old Alresford (Inhab.) 1 T. R. 358.

(*l*) Keble v. Heckringill, 11 Mod. 74. 130; S. C., 3 Salk. 9; S. C., Holt, 14; Bull. N. P. 79, recognised in Carrington v. Taylor, 11 East, 571.

(*m*) Brett v. Cumberland, Cro. Jac. 521; 2 Roll. Rep. 63.

if it be useful for navigation, and if the place over which the jurisdiction is to be exercised is likely to be benefited by it; (*n*) so, their jurisdiction extends over sea-walls and banks, as also the banks and walls of navigable and other rivers that have their course to the sea; so they have power over gutters, ditches, ponds, pools, sewers, and streams, so far as they are for the benefit of the commonwealth, but such as are fences for private grounds only, are not properly within the commission. (*o*)

For the charges of making and repairing sewers and such things as belong thereto, the land in general constitutes the *property that is rateable, copyhold as well as freehold; (*p*) so, a tenement in her Majesty's dock-yard, deriving a benefit from public sewers, and occupied by an officer of government, who pays no rent, is notwithstanding liable to the rate; (*q*) so, all things which lie in tenure; (*r*) so, also some incorporeal hereditaments, as common of pasture, piscary and turbary or the free passage of an ancient ferry; (*s*) so also herbage, parks and warrens; (*s*) but tithes seem not to be chargeable except by special custom. (*t*)

In some cases individuals are bound to repair *ratione tenuræ*: and if a man be so bound he may be charged alone; (*u*) and others will be charged only in case of his default; (*x*) and if a jury find that one ought to repair a bank, &c. which is decayed by the sea, and it be removed into the Q. B., the justices will not quash the inquisition to grant a new trial, unless the party found guilty first repair the bank, of which he shall be reimbursed; (*y*) so, a man may be bound by reason of frontage, that is, where a man's ground fronts the sea; (*z*) so, by reason of being owner of the bank, wall, or other defence; (*a*) so, by prescription or custom; but in the presentment mention must be made that he is to do the same thing *ratione talis messuagii*, &c., yet in the case of a corporation this is not necessary. (*b*)

In 19 H. 7, it is said that a man may be bound *ratione resiantię*, but this must be understood in respect of the house he inhabits; (*b*) a man may also be bound by his covenant; (*c*) so also by reason of using a thing, as a man is bound to repair a river by reason of his making use of it; (*d*) so, it seems that townships may in particular cases be subject to *a separate assessment; (*e*) but in all cases where parties are assessed to repair, [*123] it must appear that the party so assessed will be benefited; (*f*) and so in respect of a township; (*g*) and therefore where the level of a party's drains are so much above the drains falling into the great sewer, that the stopping of the sewer cannot possibly throw back the water, so as injure his premises,

(*n*) Dore v. Gray, 2 T. R. 358.

(*o*) See further Callis on Sewers; Com. Dig. tit. Sewers; Woolrych on the Law of Waters; and Dig. P. iii. tit. Sewers. (*p*) Callis, 139.

(*q*) Netherton v. Ward, 3 B. & A. 21. (*r*) Callis, 139.

(*s*) Callis, 137, citing 37 Ass. pl. 10. (*t*) Callis, 131.

(*u*) 8 H. 7, 5; Keighley's case, 10 Co. 139.

(*x*) Swanley v. Lime (Corp.) 5 Bing. 91.

(*y*) Sid. 701.

(*z*) 37 Ass. pl. 10; 8 H. 7.

(*a*) Ib. And see R. v. Essex, (Comm. Sew.), 1 B. & C. 477.

(*b*) Keilw. 52; Callis, 116.

(*c*) Callis, 118; March. 198. See also Devonshire (Earl) v. Gibbons, Hardw. 169.

(*d*) 37 Ass. pl. 10; Callis, 121.

(*e*) Callis, 122.

(*f*) Case of the Isle of Ely, 10 Co. 142; Anselm v. Barnard, 2 Keb. 675.

(*g*) R. v. Wright, 2 Keb. 42.

he cannot be assessed.^(h) and a decree by the commissioners is not conclusive against the party assessed.⁽ⁱ⁾

The whole level will be charged if lands bound by tenure, &c. are themselves overflowed by the sea; or where no persons are known who are bound by tenure or otherwise; or the party so bound is unable, or in cases of extraordinary swelling tides or floods.^(k)

[*124.]

*CHAPTER III.

INCORPOREAL HEREDITAMENTS.

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(h) *Masters v. Scroggs*, 3 M. & S. 447.

(i) *Stafford v. Hamston*, 5 J. B. Moore, 608; S. C. 2 B. & B. 691.

(k) Dy. 33; *Keighley's case*, sup., Callis, 145.

rate (whether real or personal,) or *concerning, or annexed to, or exercisable within the same. (a) It may be a right issuing out of [*125] the land or other thing belonging to the owner, which is said to be in *render*, as rent, toll or other franchise, or it may issue out of the land or other thing belonging to another, as common, &c., when it is said to be in *prender*. (b)

These latter rights may again be distinguished into rights coupled with a profit which are called profits *à prendre*, or rights without any profit which are called *easements*. A right to take something out of the soil of another is a profit *à prendre*, as the right of common, and also some minor rights as a right to take drifted sand, or a liberty to fish, fowl, hunt, hawk, &c., see Dig. P. iii. tit. Prescription, also further, post, § 498.

An easement is a privilege without a profit, as a right of way, and rights connected with water, (see ante, § 398), light and air, (see further, post, § 444, et seq.), besides some other particular rights of this kind, as a right to support from a neighbouring wall. (c) Such rights may be further distinguished into easements to be exercised on the land of another, as to pass over his land; or such as prevent a person from using his own land to the prejudice of his neighbour's easement, as where he may not dig away the support which his neighbour has a right to for the upholding his houses or land. (d) As to the rights connected with trees growing on adjoining lands see ante, § 96.

Incorporeal hereditaments not being visible property, capable of actual corporeal occupation, are held not to be within the 43 El. for the relief of the poor, and consequently not rateable, (see Dig. P. iii. tit. Poor); and the same law is made applicable by 5 & 6 W. 4, c. 50, to the highway rates (Ib. tit. Highways); but the rule is not extended to the sewers rate. (See ante, § 114.)

*§ 116. To incorporeal hereditaments are incident appendency and appurtenancy. A thing appendant is that, which beyond me- [*126] mory has belonged to another thing more worthy; appendants are therefore ever by prescription; but a thing appurtenant may be created at this day, as if a man at this day grant to another and his heirs common in such a moor for his beasts *levant* and *couchant*; or if he grant to another common of estover or turbary in fee-simple, to be burnt or spent within the manor; by these grants these commons are appurtenant to the manor, and shall pass with the grant thereof; (e) and if a thing which may be appendant or appurtenant, had always passed with the manor to which it belonged by the words *eum pertinentiis*, it must be taken to be appendant. (f) But to make a thing appendant or appurtenant it must agree in quality and nature with the thing whereunto it is appendant or appurtenant, as a thing corporeal cannot properly be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal, but things incorporeal which lie in grant, as advowsons, commons and the like, may be appendant to things corporeal, as a manor, house, or lands; or things corporeal to things incorporeal, as

(a) 1 Inst. 19, 20; 2 Comm. 20.

(b) Prest. Estates, 8, 9.

(c) Brown v. Windsor, 1 Cr. & J. 20.

(d) Stansell v. Jolland, 1 Selw. N. P. 435, 10th ed.; Wyatt v. Harrison, 3 B. & Ad. 871.

(e) Dy. 30 b; 1 Inst. 121, b.; Dodderidge on Advowsons, 38.

(f) 1 Roll. Abr. 230, 1. 27.

lands to an office, but as they must agree in nature and quality common of turbary or estovers cannot be appendant or appurtenant to land, but to a house to be spent there; (*g*) so, a leet that is temporal cannot be appendant to a church or chapel; (*h*) so, a seat in a church cannot be claimed by prescription as appendant to land, but to a house; for that the seat belongs to the house in respect of the inhabitancy thereof; and therefore although the house be part of a manor, yet, in that case, the seat may be claimed as appendant to the house. (*i*)

Another requisite to make a thing appendant or appurtenant is that the [*127] principal or superior thing must be of *perpetual subsistence, therefore if an advowson be appendant to a manor, it is in truth appendant to the demesnes of a manor which are of perpetual subsistence, and not to rents or services. As a rule, if a thing appendant be once severed, it shall never afterwards be appendant; (*k*) but to this rule there are exceptions, see *infra*, § 118.

The rule that things incorporeal cannot be appendant or appurtenant to things incorporeal admits of some exceptions, for return of writs or a leet may be appurtenant to a hundred; so may waif and stray be appurtenant to a leet, and yet these things are both incorporeal, (*l*) and it seems rather to depend upon whether the things are capable of union without any incongruity. (*m*)

The principal incorporeal hereditaments entitled to distinct consideration are—1. Advowsons; 2. Tithes; 3. Rents; 4. Annuities; 5. Right of Common; 6. Right of Way; 7. Right to Water and Watercourses; 8. Right to Light and Air; 9. Right to Pews and other Easements; 10. Offices; 11. Dignities; 12. Franchises.

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(*g*) 5 Ass. 9; 1 Inst. 121, b.; 1 Sid. 354.

(*h*) 10 E. 3, 5; Tiringham's case, 4 Co. 36.

(*i*) 1 Inst. 122, b.

(*k*) 2 Mod. 2; 2 T. R. 415.

(*l*) Hargr. Co. Litt. 121, b, citing 8 H. 7, 1, 2, 3; Rast. Entr. 128.

(*m*) *Ib.* See also 1 Vent. 186.

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§ 117. An advowson may be considered as to—1. The nature of an advowson in general; 2. The different kinds of advowsons; 3. Presentation and impropriation; 6. Incidents to an advowson; 7. How an advowson may be lost or suspended, (see post, TITLE TO THINGS REAL;) 8. Injuries affecting an advowson, (see post, INJURIES TO THINGS REAL.)

Nature of an Advowson in general.

An advowson is a right of patronage to a church or benefice; the person to whom the right of presentation belongs is called the patron, originally the *advocatus*, because the founder of every church was also the maintainer and protector thereof, and *advocatio* signified not only the superintending care bestowed on all the temporal concerns of the church, but also the right which flowed out of the same, whence is derived the word "advowson." The rights and interests of the patron are recognised as well in the Statute as in the Common Law, and accordingly the consent of the patron is required on many occasions, as by the 17 G. 3, c. 53, for mortgaging the glebe, &c., in order to provide a residence for the incumbent; by the 42 G. 3, c. 116, as to the redemption of the land-tax by the incumbent; by the 4 & 5 W. 4, c. 30, as to the exchange of common fields, where the incumbent is interested; by the 6 & 7 W. 4, c. 115, as to the inclosure of common fields; and also by the Church Building Act, see Dig. P. i. ii. tit. Benefices, Churches, Commons, Exchanges.

[*130] *118. An advowson may either be appendant or in gross, see ante, § 116. An advowson is said to be appendant to a manor, when it has been so annexed to it as to be parcel thereto and passed by a grant of the manor *cum pertinentiis*; (n) but when the property of the advowson is separated from the manor or other thing it is said to be in gross. (o)

It may be made in gross three several ways, as if a man grant a manor without the advowson; or the advowson itself be conveyed away; or if the owner of an advowson presents to it, as if it were in gross. (p)

An advowson may be appendant to so many acres of land, or to one acre; (q) or the advowson of a vicarage may be appendant to a rectory; (r) so, an advowson may be appendant for a part, and in gross for another part; (s) and although as a rule an advowson once severed cannot be again appendant, yet an advowson may be appendant for one turn and in gross for the other; (t) and if co-parceners make partition of a manor and the advowson is allotted to one, then it becomes in gross; but if the co-parcener to whom it was allotted dies without issue, and without disposing of the advowson, it will go to the other sister, and again become appendant; (u) so an advowson may become again appendant, when the act which made it in gross was avoided, as where an advowson was mortgaged, whereby it became in gross, and it was afterwards redeemed, then it became again appendant; (v) so, on

(n) 33 H. 6, 4, b.

(o) 1 Inst. 120.

(p) Dy. 103; Perk. sect. 104; 1 Roll. Abr. 232.

(q) Roll. Abr. 23.

(r) Dy. 350 b.; Moor, 894.

(s) Dy. 78.

(t) 1 Inst. 122, a.

(u) Finch's case, 6 Co. 64, a.

(v) R. v. Chester (Bishop), 3 Salk. 401.

a recovery after a usurpation ;(*w*) so, if it be expected out of a lease for life of a manor, it becomes in gross during the continuance of the lease, but upon its expiration it becomes again appendant.(*x*)

*II. Different kinds of Advowsons.

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119. An advowson is either presentative, collative or donative. An advowson presentative is when the patron presents the parson to the ordinary to be instituted and inducted in the church,(*y*) as to presentation see infra, § 120.

An advowson collative is that which is given absolutely by the bishop. Collation is, in the case of a bishop where he has the sole right, what institution is in the case of an advowson presentative. No possession is gained by a collation against the Queen.(*z*)

An advowson donative is where the patron puts the clerk in possession without any presentation to the ordinary, such livings being privileged and exempt from the jurisdiction of the bishop, and visitable by the patron only.(*a*) In this case, the party is in full possession immediately on his nomination, and may maintain an action for money had and received against any person who takes the profits.(*b*)

If the patron of a donative once present to the ordinary, and his clerk is admitted and instituted, it is said that the advowson is now become presentative, and shall never be after donative, 1 Inst. x. 344, a., sed contra Ladd v. Widdows, 2 Salk. 541 ; where it was held, that though a presentation might destroy an impropriation, it could not destroy a donative, because the creation thereof was by letters-patent. As to donatives under 1 G. 1, c. 10, see Dig. P. ii. tit. Benefice, Church.

III. Presentation.

120. A right of patronage is principally exercised by the act of presenting a clerk. This subject may therefore be considered under the following heads :—1. Wherein it *consists ; 2. How and when to be made ; 3. By whom to be made ; 4. Incidents to presentation ; 5. When it may be revoked ; 6. When void or voidable. [*132]

1. Wherein presentation consists.

Presentation is a known term in law, and signifies the offering a clerk to the bishop to be admitted and instituted. It is distinguished from nomination, which is the offering a clerk to the patron ; and these two things may be in different persons, thus trustees may have the right of presentation, and the *cestui que trust* must nominate ;(*c*) so, the mortgagee has the right to

(*w*) Hob. 140.(*x*) Finch's case, sup.(*y*) 2 Comm. 22.(*z*) R. v. York, (Bishop) 1 Leon. 226.(*a*) Sulliv. Lect. viii.(*b*) 1 T. R. 403.(*c*) Seymour v. Bennet, 2 Atk. 482 ; Botcler v. Allington, 3 Atk. 458 ; Att.-Gen. v. Scott, 1 Ves. 415 ; Mutter v. Chauvel, 1 Mer. 493.

nominate;(*d*) so, a person may grant to another and his heirs, that whenever the church becomes vacant he will present such person as grantee may nominate, "and this is a good grant;"(*e*) and the nomination is the effect of the advowson, and he who has it is the patron; and the person who is to present is the subject or servant to execute;(*f*) but where the nomination and presentation is in different persons, the presenter is to judge of the qualifications of the nominee in the same manner as the bishop does.(*g*)

By the 6 G. 4, c. 16, the assignees of a bankrupt, and by the 1 & 2 V. c. 110, the assignees of an insolvent, must present the person nominated by the bankrupt and insolvent. See Dig. P. ii. iii. tit. Bankrupt and Insolvent Debtors.

The appointment of a curate to officiate under an incumbent in his own church, must be by such incumbent's nomination of him to the bishop.(*h*) The appointment of a curate to a chapel of ease belongs properly to the incumbent of the mother church, who being instituted to the cure of souls [*133] throughout the whole parish may therefore himself serve in the chapel as well as his curate or chaplain,(*i*) unless it be in the case of chapels augmented by the governors of Queen Anne's Bounty. See Dig. P. i. ii. tit. Augmentation, Benefice. But by agreement of the bishop, patron and incumbent the inhabitants may have a right to elect and nominate a curate;(*k*) if there be an agreement it must be by deed;(*l*) but there may be a prescription, in which every thing is presumed to be proper.(*l*)

2. How and within what Time to be made.

121. Presentation must be to a void benefice;(*m*) but there may be a presentation to a deanery, archdeaconry, or prebend,(*n*) though not to a donative, see ante, § 119.

Before the Statute of Frauds a presentation might be made by parol, and if it were by writing it was not necessary to be by deed, being in the nature of a letter of recommendation of the clerk to the bishop;(*o*) but now if it be a common person he must shew how the presentation is made, for a presentation conveys an interest in lands and tenements;(*p*) so, it is said that the queen may present by parol if the bishop be present;(*p*) the usual way however is to make a presentation by instrument under the Great Seal.(*q*)

Regularly the presentation by the queen ought to shew by what title she presents, for if she mistake her title, as if she presents *ratione lapsus*, when she is very patron, she is deceived, and her presentation is void;(*r*) otherwise if she present generally, without saying by what title.(*s*)

(*d*) *Amburst v. Dawling*, 1 Vern. 401; *Gardiner v. Griffith*, 2 P. Wms. 404; *Mackenzie v. Robinson*, 3 Atk. 559; *Croft v. Powell*, Com. 609. (*e*) *Moore*, 49.

(*f*) *Hare v. Bickley*, Plowd. 529; *Calvert v. Kitchen*, Lanc. 72.

(*g*) *R. v. Stafford*, (Marq.) 6 T. R. 646. (*h*) 2 Burn's E. Law, 55 f; *Phill. ed.*

(*i*) *Hob. 67*; 2 *Ves. 427*.

(*k*) *Herbert v. Westminster*, (Dean, &c.) 1 P. Wms. 773.

(*l*) *Dixon v. Kershaw*, Amb. 528.

(*m*) *Owen v. Stainol*, Skinn. 45.

(*n*) 2 *Roll. Abr. 342*; 1 *And. 241*.

(*o*) 1 *Inst. 120, a.*

(*p*) 1 *Brownl. 162*.

(*q*) *Cro. Jac. 248*.

(*r*) *Green's case* 6 Co. 22; *Cro. Car. 99, 592*; *Vaugh. 14*.

(*s*) *R. v. Thorneborough*, 1 *Mod. 254*.

Every common person ought to present within six months after the avoidance of the church by the death of the *incumbent ;(*t*) otherwise the presentation lapses to the bishop, even although the patron presents, [*134] if his clerk is refused ;(*u*) so, if the church becomes void by statute, as by acceptance of a plurality ;(*x*) and the six months shall be reckoned by the calendar ;(*y*) but if the avoidance be by resignation or deprivation the six months do not commence until notice of the avoidance given by the ordinary to the patron ;(*z*) so, though the temporalities are in the queen's hands, for the guardian of the spiritualities ought to give notice. (*a*)

3. *By whom to be made.*

122. A presentation ought regularly to be made by the very patron, and if not, the nominee of the patron must be presented, see ante, § 120. By common right the parson, and not the patron of the parsonage, shall be the patron of the vicarage ;(*b*) so by common right, the bishop is patron of all his prebends. (*c*) As to who may present, it will be necessary to consider presentation by guardian or infant, feme covert or husband, heir or executor, co-parcener or tenants in common, tenant in dower, and papists ; by lapse, and by the queen.

Guardian by nurture or socage of a manor whereunto an advowson is appendant shall not present to a church, because he can take nothing for the presentation for which he may account to the heir, and therefore the heir, although an infant shall present. (*d*)

A feme covert cannot present alone, but the presentation must be by husband and wife ;(*e*) and although the right of *patronage descends to the heir of the wife, yet the right of presenting during life belongs [*135] to the husband, who is tenant by the curtesy, (*f*) see further *infra*, as the co-parceners.

As to when the heir and when the executor may present, see ante, § 9.

If co-parceners agree, they are to join in the act of presentation, otherwise the eldest shall have the preference, and afterwards the rest in turns, (*g*) the court will direct them to draw lots, who shall have the presentation ;(*h*) but when the right is in joint tenants or tenants in common, and there is no composition in writing to present by turns, they must of necessity join in the presentation, for if they present singly, the bishop may refuse the clerk. (*i*)

A composition to present in turn may be either by record, or deed, or parol. A composition by parol however can only be between privies in blood ;(*k*) between strangers it must be by deed. (*l*) Where an advowson

(*t*) 3 Leon. 46; 2 Roll. Abr. 363, l. 25.

(*u*) Dy. 327 b.

(*x*) Dy. 237 a.; 4 Inst. 632; W. Jo. 338; R. v. Canterbury (Archb.) Cro. Car. 357.

(*y*) Dy. 327, in marg.

(*z*) Green's case, sup.

(*a*) 2 Roll. Abr. 365, l. 26.

(*b*) 2 Roll. Abr. 336, l. 12. 25. But see, *contra*, as to parson inappropriate, Mallet v. Trigg, 1 Vern. 42.

(*c*) 3 Co. 75 b.

(*d*) 3 Inst. 156; Arthington v. Coverley, 2 Eq. Ca. Ab. 518; Hearle v. Greenbank, 3 Atk. 710; Sherrard v. Lord Hardborough, Amb. 165; Kensey v. Langham, Cas. temp. Talb. 143; and see Cro. Jac. 99.

(*e*) Gibs. 794; Wats. Cl. L. c. 9.

(*f*) Harris v. Nichols, Cro. El. 19.

(*g*) 1 Inst. 18, b.; Gibs. 794.

(*h*) Seymour v. Bennett, 2 Atk. 482.

(*i*) 1 Inst. 18, b.

(*k*) Salisbury (Bp.) v. Phillips, 1 Salk. 43; S. C. Carth. 505; 12 Mod. 321.

is held in common, and the rota of presentation is not expressly settled, the first and peaceable presentations are evidence of composition between the parties ;(*l*) and prerogative presentations are not turns to deprive a patron of his turn.(*l*)

If two sisters, co-parceners, present jointly, then marry and settle their estates and die ; the husband of the eldest, tenant by the curtesy, shall present first, as assignee, for the grantees of parceners have the same privileges as parceners themselves ;(*m*) so, if two parceners assign their part of an advowson severally.(*n*) If upon a presentation the church be full, the turn is served, and if an incumbent be deprived *quia merè laicus*, for [**136*] the church was full till the declaratory ^{*}sentence ;(*o*) but if the presentation be wholly void, it shall not serve the turn.(*o*)

If a man seised of an advowson die, leaving a widow, the heir shall have two presentations, and the widow the third as her dower, and she may recover the same in an action, or it may be assigned to her.(*p*)

When a corporation presents, it must be under their common seal, and by the true name of their corporation.(*q*)

Papists are by several statutes prevented from presenting to benefices, see Dig. P. i. tit. Papists.

If a patron does not present within six months after avoidance, the church lapses to the bishop ;(*r*) and it will incur, from the time of institution into a second benefice, against the patron, if notice be given him, otherwise not ;(*s*) the lapse occurs, though the patron be an infant.(*t*)

If the bishop does not present, the church lapses to the archbishop ;(*u*) if the archbishop does not present, then it lapses to the queen ; or to her successor ;(*v*) and no lapse incurs where the queen is patron, although she does not present within the six months ; but if the queen does not present, the ordinary may have the church served ;(*x*) so, after a lapse, if the patron presents before the bishop or archbishop collates, his clerk shall be instituted ;(*y*) so, after a lapse to the queen, if she do not take advantage thereof(*z*) and sequester the profits.(*a*)

[**137*] ^{*}The queen is patron paramount of all the benefices in England, in virtue of which, the care of filling all such churches as are not regularly filled, devolves to the crown.(*b*) If the queen be seised of an advowson, in which the church exceeds the value of 20 marks, she herself shall present ;(*c*) but to a church of the Crown, under that value, the chancellor shall present.(*c*)

If an archbishop or bishop dies, and while the temporalities are in the

(*l*) *Grocers' Co. v. Canterbury* (Archbp.,) 2 Bl. 770 ; S. C. 3 Wils. 214. 221.

(*m*) *Buller v. Exeter* (Bp.,) 1 Vez. 340.

(*o*) 5 Co. 102 ; 2 Roll. Abr. 347, l. 35.

(*p*) Dy. 35, b. ; 1 Inst. 351 ; Wats. Cl. L. 89.

(*q*) *Ayray v. Lovelas*, Bulstr. 91 ; sed *contra*, Dean and Chapter of Norwich's case, 3 Co. 73. And see *Stafford* (Mayor, &c.) v. Bolton, 1 B. & C. 40.

(*r*) 2 Inst. 273.

(*s*) *Wolferstan v. Lincoln* (Bp.,) 2 Wils. 174.

(*t*) 3 Leon. 46.

(*u*) *Boon v. Rochester* (Bp.,) Hutt. 24 ; Wats. c. 15.

(*v*) *R. v. Canterbury* (Archb.,) Cro. Car. 355 ; W. Jo. 337.

(*x*) 2 Inst. 273.

(*y*) *Hob. 152* ; *Boon v. Rochester* (Bp.,) Hutt. 24 ; 2 Inst. 273.

(*z*) *Ow. 2* ; 1 Mod. 224. But see *R. v. Lincoln* (Bp.,) Cro. El. 119 ; *Cumber v. Chichester* (Bp.,) Cro. Jac. 216 ; 2 Roll. Abr. 368 ; *Beverly v. Canterbury* (Archbp.,) *Ow. 3*.

(*a*) Doct. & Stud. 36. 219.

(*b*) *Gibs. 763*.

(*c*) 38 E. 3, 3, b. ; *Hob. 214*.

queen's hands a church in his patronage becomes vacant, she shall present; (d) so, if the incumbent be created a bishop, by which a church becomes void, though a subject be patron, the queen shall present; (e) but when the incumbent of a donative is made a bishop she shall not present. (f)

If a person be outlawed the queen shall present, but if the outlawry be reversed, then the patron shall present; (g) so, if the queen do not present on the next avoidance, she shall not present afterwards; (h) but if her clerk dies before induction, she shall present *de novo*; (i) and this prerogative takes away the right of none, only postpones the right; therefore the royal prerogative of presenting to a church, vacant by the incumbent being promoted to a bishopric, does not destroy the effect of a prior grant of the next presentation by the owner of the advowson. (k)

So, where one has the nomination and another the presentation, if such right of presentation accrues to the queen, this shall not be to the prejudice of him that has the nomination, but he may still nominate to the chancellor; and if the queen presents without any such nomination, the nominator shall bring his suit against the incumbent only, because the queen cannot be termed a usurper. (l)

*4. Incidents to Presentation.

[*138]

123. The ceremonies connected with presentation are admission, institution, and induction.

Admission, in its ordinary and limited sense, is taken for the act of the bishop, who, on approval of the presentee, after examination, declares him fit to serve the cure of the church, to which he is presented by the words *admitto te habilem*. (m)

Institution is a conveyance or commitment of the cure of souls from the bishop to the incumbent by the words *Instituo te ad tale beneficium, habere curam animarum, et accipe curam tuam et meam*. (n) The bishop may institute under the episcopal or any other seal, as well out of his diocese as within it; for the matter is not local, but follows the person wherever the bishop goes. (o)

By admission and institution a church is full against a common person, but not against the queen before induction; (p) so there is no seisin or possession of the church before induction; (p) but an incumbent, even on a wrongful presentation, who remains six months in possession after institution, cannot be removed. (q) A church being full by institution, if a second institution is granted to the same church, this is called a superinstitution, which is triable in the Ecclesiastical Court before induction. (q) When the

(d) Bro. Present. 10. 13; 2 Roll. Abr. 344, l. 21.

(e) Wentworth v. Wright, Cro. El. 526; S. C., nom. Wright's case, Ow. 144; Moor, 399. (f) Ca. Parl. 184. (g) Id. 139.

(h) Cro. El. 790.

(i) Giles's case, Cro. Jac. 403.

(k) Calland v. Trower, 2 H. Bl. 324. See also Grocers' Co. v. Canterbury (Archbp.), 3 Wils. 231. (l) Dodd, on Advow., Lect. 12, 63.

(m) Colt v. Coventry (Bp.), Heb. 153; 1 Inst. 334, a; Britton v. Ward, 2 Roll. Rep. 109; Wrightson v. Brown, 3 Lev. 211; Wats. Incumb.

(n) 1 Inst. 344, a; Digby's case, 4 Co. 79.

(o) Cort v. St. David's (Bp.), Cro. Car. 341; Degges, P. C. P. i. ch. 2, 7.

(p) Hare v. Bickley, Plowd. 528; Boswel's case, 6 Co. 49.

(q) Boswel's case, sup.; 2 Inst. 358.

ordinary is also the patron and confers the living, presentation and institution are one and the same thing.(r) As to the remedy in case the ordinary refuses institution, see post, INJURIES TO THINGS REAL.

[*139] Induction is the investiture of the temporal part of the *benefice or the corporeal seisin, as institution is of the spiritual, and the clerk is not complete incumbent until such corporeal possession; and no lapse incurs from the time of the institution, but from the time of the induction, for it is the induction into a second benefice that vacates the first, and not the institution to it;(s) so, if a bishop makes admission and institution to his clerk, and dies, and the temporalities come into the queen's hands before induction, the queen shall have the presentation.(t) Without induction, the clerk is not parson, for by this he becomes seised of the temporalities of the church, so as to have power to grant them or sue for them, and on this account it is compared to livery and seisin, by which possession is given to temporal estates; and what induction works in parochial cures is effected by installation into dignities, prebends and the like, in cathedral churches.(u)

Induction is an act of a temporal nature and on that account cognisable only in the temporal courts.(x) But see further, post, INJURIES TO THINGS REAL; as to the requisities after induction, see Dig. P. ii. tit. Clergy.

5. *When Presentation may be revoked.*

124. The queen may revoke her presentation at any time before induction, notwithstanding letters obtained for admission, institution and induction;(y) so, there may be a revocation in law as in fact, as where the presentee of the queen dies before induction, this is a revocation in law;(z) so, where the queen presents her clerk, and dies before he is admitted;(a) so, if the chancellor presents to a benefice, supposing it to be under value and [*140] the queen being apprized of it, repeals the presentation, and presents one in her own name, this is a good repeal, because the queen has a right precedent.(b)

It was formerly thought that none but the queen could revoke,(c) but the contrary appears to be now the settled doctrine.(d)

6. *When void or voidable.*

125. The clerk of a co-parcener being once complete incumbent, the turn is served, although he is afterwards deprived; thus where the institution is voidable by sentence declaratory, as the church is full until the sentence is declared, the turn is gone.(e) But if, after presentation, institution, and

(r) See ante, § 119.

(s) *Wolferstan v. Lincoln (Bp.)*, 2 Wils. 174; S. C. in error, nom. *Lincoln (Bp.) v. Wolferstan*, 3 Burr. 1510. (t) *Hare v. Bickley*, sup.

(u) Dy. 221 b; Plowd. 528; 2 Roll. Rep. 451.

(x) *Hob. 15*; *Gibs. 815*.

(y) 1 Inst. 344, b; 2 Roll. Abr. 353.

(z) *Gyles v. Colshil*, Dy. 360 b; *Sheffield v. Ratcliffe*, *Hob. 339*; *F. N. B. 34*; *Hutchins v. Glover*, Cro. Jac. 463; *Wright v. Norwich (Bp.)*, 1 Leon. 156.

(a) *Godolph. 266*.

(b) *Bedingfield v. Canterbury (Archbishop)*, Dy. 292; *Walrond v. Pollard*, Dy. 293; *Green's case*, 6 Co. 29.

(c) *Stoke v. Sykes*, *Latch. 191*; *Rogers v. Helled*, 2 Bl. 1039.

(d) *Ib.* See also *Att.-Gen. v. Wycliffe*, 1 Vez. 80.

(e) *Windsor's case*, 5 Co. 102.

induction, the church remains actually void, as where the presentee does not read the articles, there the turn is not served, but the presenter may present again without sentence of deprivation. (*f*) As to TITLE TO THINGS REAL and INJURIES TO THINGS REAL, see further, post, under those titles.

IV. Grant of an Advowson.

126. Under this head it will be necessary to consider 1. How an advowson passes under a grant; 2. Grant of the next avoidance by the queen; 3. Grant by the Crown.

1. *How it passes.*

An advowson, if appendant, being an incident, will pass with its principal, as a manor or other corporeal thing to which it is annexed, and therefore it will pass by the grant of a manor under the words *cum pertinentiis*; (*g*) but a *demise for years of a manor *cum pertinentiis*, will not pass an advowson to a lessee, for a spiritual benefice cannot be granted for [*141] years or at will; (*h*) so, a grant by a person of *ecclesia sua* passes an advowson; (*i*) or of all his tenements and hereditaments; (*k*) but it will not pass by the word "lands;" (*l*) so, the advowson of a vicarge with all commodities, emoluments and appurtenances, without the word "hereditaments" will not pass an advowson; (*m*) but it is not necessary for the word "advowson" to be expressed, so as words equivalent be used. (*n*)

An advowson in gross being an incorporeal hereditament passes only by grant by deed and not by livery; (*o*) but as to livery see 7 & 8 V. c. 76. Prec. Conv., Append. No. XVIII.

2. *Grant of the next Avoidance.*

127. As the right of patronage in an advowson may pass by the grant of the patron, so the right of presenting to an avoidance or any number of avoidances may be the subject of a grant; (*p*) but an actual vacancy cannot be granted; (*q*) therefore if an advowson be sold during a vacancy, the next presentation does not pass, (*r*) although the grant of the advowson itself is valid; (*s*) so, if a presentation be made by usurpation, and the benefice be sold in the mean time, the case is the same because the church was never

(*f*) *Baker v. Brent*, Cro. El. 679; *Windsor v. Canterbury* (Archbp.), Cro. El. 687; *S. C.*, Moore, 558. (*g*) 1 Inst. 307, a; *Stampe v. Clinton*, 1 Roll. Rep. 100.

(*h*) *Case of Fernes* (Dean, &c.), Dav. 45; *Wats. Cl. L. c. 15*.

(*i*) *Ashegell v. Dennis*, 1 Leon. 191.

(*k*) Dy. 323 b; *Hob. 304*; *Perk. Grants*, s. 116; 2 Roll. 185, l. 30.

(*l*) *Savil v. Savil*, Fort. 351; *Westfaling v. Westfaling*, 3 Atk. 160: see also *Robinson v. Tonge*, 3 P. Wms. 401; *S. C.*, 3 B. P. C. 556; *Kynaston v. Clarke*, 2 Atk. 206; *Albemarle (Earl) v. Rogers*, 2 Ves. jun. 477.

(*m*) *Anon.*, Cro. El. 163; *Anon. Dy. 351*; *Westfaling v. Westfaling*, sup.

(*n*) *Smith v. Stapleton*, Plowd. 435; *F. N. B. 33*; *Wats. Cl. L. c. 30*.

(*o*) 1 Inst. 17, a., 332, a.

(*p*) *Throckmorton v. Tracy*, Plowd. 150; *Crisp's case*, Cro. El. 164; 1 Inst. 249, a.

(*q*) *Stephens v. Wall*, Dy. 282. (*r*) *Leake v. Coventry* (Bp.), 1 Cro. El. 8, 11.

(*s*) *Greenwood v. London* (Bp.), 3 Burr. 1510.

[*142] full of that clerk, and that would be an evasion of the *law ;(*t*) so, it seems to be the general opinion that if a person purchases the next avoidance with intent to present a particular person, and the church becomes void, and the party is presented, this is simony ;(*u*) and if the church be purchased with intent to present a son, it appears that it makes no difference.(*x*) Where, however, a church is void and a grant of the next avoidance is made, the grant will pass a future avoidance, although not the next immediate presentation ;(*y*) so, if two persons possess the grant of the next avoidance, and after the church has become void, one of them relinquish his right to the other, nothing will pass by the release, and they must both join in the presentation as before ;(*z*) *sed secus* if the release had been before the avoidance.(*a*)

If a person grants the next presentation to one, and afterwards grants the next presentation to a second, the second grant is void, and the grantee shall not have the second presentation ;(*b*) unless the first grantee proceeds on a simoniacal contract, and the queen afterwards presents on her title of simony, then the second grantee may present when the church is void of the queen's incumbent.(*c*)

A next avoidance being but a chattel interest, the grant must be to the grantee and his executors, but if it be to the grantee and his heirs the executors will have it ;(*d*) this is however to be understood of presentative benefices, for in a donative such void turn descends to the heir.(*e*)

[*143] *By the 12 A. st. 2, c. 12, grants of the next avoidance to clergy-men are declared simoniacal and void, see Dig. P. ii. tit. Advowson ; P. iii. Presentation.

3. Grant by the Crown.

128. Grants by the Crown differ from those by the subject in two particulars :—First, the grant of a manor by a subject passes an advowson that is appendant, see ante, § 126 ; but it is otherwise in the case of royal grants, where an advowson will not pass except it be expressly named, and that by virtue of the Statute *de Prærogativâ regis*, see Dig. P. ii. tit. Advowson ; and so it has been adjudged in several cases ;(*f*) but some cases have been deemed not within the reason of the statute, such as the Crown's restitution of lands to the heirs of idiots, or of the temporalities of bishops ;(*g*) so, words of reference have been deemed sufficient as when the king granted a

(*t*) Walker v. Hammersley, Skinn. 90.

(*u*) Kitchen v. Calvert, Lane, 102.

(*x*) Wincombe v. Puleston, Noy, 29 ; Anon. Godbolt, 390 ; but see as to this latter point Smith v. Shelborne, Moor, 916 ; S. C. Cro. El. 685 ; Wincombe v. Winchester (Bp.), Hob. 165.

(*y*) Anon., 1 Dy. 26 a. ; Agard v. Peterborough (Bp.), 2 Dy. 129 ; S. C. 1 And. 15 ; Stephens v. Clark, Moor, 89 ; Brokesby v. Wickham, 1 Leon. 167 ; Baker v. Rogers, Cro. Car. 173 ; Wolferstan v. Lincoln (Bp.), 2 Wils. 174 ; S. C., in error, 3 Burr. 1504 ; S. C., 1 Blackst. 490.

(*z*) Brokesby v. Lincoln (Bp.), 1 And. 223.

(*a*) Lewis v. Bennet, Moor, 467.

(*b*) Williams v. Lincoln, (Bp.) Cro. El. 790.

(*c*) Wincombe v. Winchester (Bp.), Hob. 165 ; Wats. Cl. L. c. 10.

(*d*) Anon., Dy. 26 a.

(*e*) 1 Inst. 90, a.

(*f*) Willion v. Berkley, Plowd. 243 ; Stukeley v. Butler, Hob. 170 ; Whistler's case, 10 Co. 64.

(*g*) Staundf. Prærog., 43, a. ; Dodder. Advows. 36.

manor with all its appurtenances, as the same came to or were possessed by the Crown.(h)

In the next place, although the grant by a subject of a void turn is void, yet such grant by the Crown is good;(i) but if during the avoidance the queen grant a manor to which an advowson is appendant, with all advowsons appendant thereto, the void turn will not pass by these words.(k) A right of presentation however, accruing to the queen by lapse is not grantable either before or after its fall;(l) where therefore the queen has two titles to the same church, one as patron and the other by lapse, and she grants the advowson generally, the grantee will not be entitled to the void presentation.(m)

*V. Appropriation and Impropriation.

[*141]

1. Appropriation.

§129. Appropriation of an advowson was, when the church, with the tithes, glebe, &c., was appropriated to the perpetual use of some corporation, religious or ecclesiastical, regularly it was made to a sole corporation which performed divine service;(n) but sometimes to a dean and chapter.(o) In all cases the sufficient endowment of a vicar was a necessary condition of appropriating a benefice, and without such an endowment the appropriation was not good.(p) Where the vicarage is not endowed the impropriator of the small tithes is bound to maintain a priest, and upon information by the Attorney-General, the Queen may assign such allowance as she thinks proper.(q) Such a minister is called a perpetual curate; between whom and a vicar there is this difference, that the latter is in for life, and the former, as it is said, at will only.(r) A vicar is usually endowed, but a curate never,(s) except since Queen Anne's Bounty, (see Dig. P. i. tit. Augmentation;) so, where there is a curate the parson is incumbent, but where there is a vicar, the vicar is incumbent.(t)

A vicarage by indowment becomes a benefice distinct from the parsonage; and as a vicar is now enabled to recover his temporal rights without the aid of parson or patron, so he has the whole cure of souls transferred to him by the institution of the bishop.(u) The parson, by making the endowment, acquires the patronage of the vicarage, and if the parson makes a lease of the parsonage without reserving *to himself the right of presenting to the vicarage, the patronage of the vicarage passes as incident [*145] to it.(x)

(h) Whistler's case, sup.

(i) Dy. 282, 300; George v. Dalton, 3 Leon. 196; S. C. Gouldsb. 73; Ow. 53.

(k) Case of Bedminster Manor, Dy. 300, a.; Fane's case, Cro. Jac., 26; George v. Dalton, sup.; but see contra, F. N. B., 33, 18, and Dy. 282.

(l) Colt and Glover's case, Hob. 154.

(m) Dy. 348; 2 Roll. Abr. 196.

(n) Plowd. 496.

(o) Ib.; Parry v. Bancks, Cro. Jac. 518; 1 Roll. Abr. 238.

(p) Grendon v. Lincoln (Bp.), Plowd. 496; Colt v. Coventry (Bp., 140; Seld. c. 12, s. 1.

(q) Bonsey v. Lee, 1 Vern. 247.

(r) Bunb. 231.

(s) Bunb. 273.

(t) Burn, F. L. tit. Appropriation, Phill. ed.

(u) Britton and Wade's case, 1 Sid. 426; Gibs. 719.

(x) Shirley v. Underhill, 2 Roll. Rep. 304; Dixon v. Kershaw, Ambl. 320; and see Portland (Duke) v. Bingham, 1 Consist. 162.

There were no vicarages at common law, and therefore no tithes or profits *de jure* belong to the vicar only by endowment and prescription.(y)

An advowson will be disappropriated, if the body to which it is annexed is dissolved ;(z) so, if a presentation be made to the church, it becomes ever after presentable.(a)

2. Impropriation.

130. Although appropriations were regularly made to spiritual persons only, yet many grants of parsonages were made to the Crown by laymen, particularly in the reign of Hen. 8, and that which was an appropriation in the hands of spiritual persons is usually and properly called an impropriation in the hands of a layman ; and by the statutes for dissolving religious houses the rectory tithes, &c. impropriate come to the hands of lay persons are temporal inheritances,(b) transferable as any other species of property, and for which the same actions may be brought.(c)

Before the Reformation, if the benefice was given *ad mensam monachorum* and so not appropriated in the common form, but granted by way of union *pleno jure*, in that case it was served by a temporary or stipendiary curate, belonging to their own house, and sent out as occasion required ; but when such appropriations with the charge of providing for the cure were transferred (after the dissolution of the religious houses) from spiritual societies to lay individuals, who were not capable of serving them by themselves, they were consequently obliged to nominate some particular person [*146] to the ordinary for his license to serve the cure : which gave *rise to perpetual curacies, as they are now termed, the person so licensed not being removable at the pleasure of the impropriator, nor in any other manner except by due revocation of the license of the ordinary ;(d) but it has been held that land annexed to a perpetual curacy cannot be leased by the curate so as to bind the successor, without the consent of the ordinary and patron.(e) As to the union of churches, see Dig. ii. tit. Churches.

VI. Incidents to an Advowson.

131. The most important incidents to an advowson are what regards estates in an advowson, and conveyances of such estates.

An advowson or the general right of presentation was held to be a valuable thing which might be sold and its annual value estimated ;(f) but the exercise of this right is deemed a matter of trust,(g) and therefore an advowson will not pass under the name of " commodities, emoluments, profits, and advantages ;"(h) and on the same principle the next immediate presentation cannot be sold ;(i) and on the same principle bonds given to resign

(y) Britton and Ward's case, Palm. 113.

(z) Plowd. 501.

(a) Plowd. sup. ; 1 Roll. Abr. 240.

(b) Inst. 159, a. ; W. Jo. 3.

(c) Baldwin v. Wine, Cro. Car. 301.

(d) Gibs. 819 ; and see 1 Consist. 165.

(e) Doe v. Thomas, 9 Ad. & Ell. 556 ; 1 Per. & Dav. 578.

(f) Fleta, 1, 2, c. 71 ; Britt. 185.

(g) Barrett v. Glubb, 2 Bl. 1052.

(h) London (Bp.) v. Southwel (Chapter, &c.) Hob. 303.

(i) See ante, § 127.

any benefice upon the request of the patron, whether general or special, were held invalid, until the 9 Geo. 4, c. 94, made special bonds of resignation in favour of a son or other near relative valid under particular restrictions; (j) so, on the same principle, of an advowson, wherein a man has an absolute ownership as he has in lands and rents, he shall not plead that he is seised in his demesne as of fee, because that inheritance savouring not *de d_omo*, cannot serve for the sustentation of him or his *household; (k) *sed* [*147] *secus* as to the Crown; (l) and in a writ of a writ of right of advowson [before 3 & 4 W. 4, c. 27, (m)] a man should not allege the esplees or taking the profit in himself; (n) so, on the same principle, guardian in socage cannot present, see Dig. iii. tit. Guardian and Infant.

An advowson being an incorporeal hereditament presentation to a church is the only seisin.

A person may have the same estate in an advowson, both in respect of quality and quantity, as in any other real possession; so, there may be an equitable owner of an advowson, as *cestui que trust*, or purchaser before conveyance, but the trustee or mortgagee will have the bare right of presentation and not of nomination. o)

There may be curtesy of an advowson, but before the late Dower Act, (see Dig. ii. tit. Dower,) if the advowson were appendant, and the wife died before entry into the manor, the husband could not present because he had no seisin; (p) but it seems to have been otherwise where the advowson was in gross. (q)

There may also be a tenant in dower of an advowson; and if a widow is endowed of a third part of a manor to which an advowson is appendant, the third part of the advowson shall pass therewith; (r) and if the estate of the husband consists of three manors appendant, the common-law right of dower is as it seems the third presentation to each advowson. (s) If the advowson be in gross, the assignment of dower must be of the third presentation. (t)

The descent of advowsons followed the rules of the *common law [148] or of custom as the descent of other property, except so far as [*148] regarded the *possessio fratris*. (u) the law respecting which is now altered; (see Dig. P. iii. tit. Inheritance;) so also as to presentation by co-parceners. (x)

But in donatives the right of donation descends to the heir-at-law, where a vacancy has occurred in the lifetime of the ancestor, because there is no lapse in donatives, and the executor has no title, as he would have in presentative advowsons. (y)

So an advowson was held to be assets by *descent*, and before the 3 & 4

(j) See Preced. in Convey. tit. Bonds, 3d ed.

(k) 7 E. 3, 63; 24 E. 374; 1 Inst. 17, a.

(l) 34 H. 6, 34; but see 26 E. 3, 64; Plowd. 503.

(m) See Dig. P. iii. tit. Limitations.

(n) 8 E. 2, Pres. al. Engl., 10; Bract. 1. 4, fol. 263; Fleta, l. 5, c. 5.

(o) Cleer v. Peacock, Cro. El. 359; Amburst v. Dowling, 2 Vern. 401; Gardiner v. Griffith, 2 P. Wms. 404; Westfaling v. Westfaling, 3 Atk. 453; Galley v. Selby, 1 Str. 333.

(p) Hargr. Co. Litt. 23, a., n. (5).

(q) 1 Inst. 29, a.

(r) 1 Inst. 30, b.

(s) Dy. 35; 1 Inst. 351.

(t) Howard v. Cavendish, Cro. Jac. 621; citing 13 E. 2, Dower, 161; 11 E. 3, Id. 80.

(u) 1 Inst. 14, b.

(x) Ante, § 132.

(y) 1 Inst. 90, a., n. 4; Repington v. Tamworth School (Governor), 2 Wils. 153, &c.

W. 4, c. 104, making all real property assets for the payment of debts, was adjudged to be such and ordered to be sold for that purpose.(z)

132. An advowson in gross may be transferred by every species of conveyance applicable to the transfer of real incorporeal property, according to the nature of the owner's estate therein.(a) There are, however, some diversities arising from the different kinds of advowsons, and the nature of the property in them. As an advowson must pass by grant, a conveyance by the deed of the tenant in tail would not before the 7 & 8 V. c. 76,(b) have worked a discontinuance, therefore if tenant in tail of a manor, whereunto an advowson was appendant, made a feoffment with or without deed, of one acre with the advowson, and the church became void and the feoffee presented, and then the tenant in tail died, and the church became void, the issue should not present, until he had continued the acre, but if the feoffee had not executed the same by presentation then the issue in tail should have presented;(c) and an advowson appendant underwent before the 6 & 7 V. c. *76,(d), all the consequences of a discontinuance of the principal, [*149] but an advowson in gross could not be discontinued because discontinuance could arise only in things which might pass by livery;(e) so, where there is a remitter to a manor there will be remitter to an advowson which is appendant thereto.

Again, a grantor can alien an advowson for so long a period only as his estate or interest continues therein, therefore if a tenant in tail or for life grants the next avoidance and dies before the avoidance takes place, the grant is void as against the issue in the one case.(f) and as against the remainder-man in the other;(g) and the case is the same although the heir of tenant in tail joins in the grant, it shall nevertheless be void as against him, because he had nothing in the advowson, either in possession or right, or actual possibility at the time of the grant;(h) but where a grantor possessed of a term of years in a rectory, to which the advowson of a vicarage was appendant, granted the next avoidance and then died, it was held that the estate of the grantee was not defeasible by surrender of the term by the grantor's administrator, but that he should have the next avoidance, for otherwise the grantor would derogate from his own grant.(i) See further as to the grant of the next avoidance, ante, § 127. As to when a church becomes void, &c., see post, TITLE TO THINGS REAL and INJURIES TO THINGS REAL.

(z) *Tonge v. Robinson*, 1 P. Wm. 301; S. C., in error, 1 B. P. C. 114.

(a) See ante, § 126. (b) See *Prece. Conv.*, Append. No. xviii., 3rd ed.

(c) *Bredon's case*, 1 Co. 76; 1 Ins. 333, b.; 1 Roll. Abr. 632.

(d) *Prece. Conv.*, Append. No. xviii.

(e) 1 Inst. 332, a. But see as to livery, 7 & 8 V. c. 76, sup.

(f) *Bowles v. Walter*, 1 Roll. Abr. 843.

(g) *Davenport's case*, 8 Co. 144; *Dymoke v. Hobart*, 1 B. P. C. 108.

(h) *Wircl's case*, 1 Hob. 45.

(i) *Davenport's case*, sup.

*SECTION III.

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TITHES.

§ 133. What are tithes.

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§ 133. Definition.

| § 133. Different Kinds of Tithes.

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§ 133. Tithes are an ecclesiastical inheritance collateral to the estate of the land and due only to an ecclesiastical person by ecclesiastical law. They may be considered under the following heads:—1. Nature of and incidents to tithes; 2. To whom payable; 3. By whom payable or otherwise; 4. What things titheable or otherwise; 5. Setting out tithes. 6. Exemptions from tithes; 7. New law under the Tithes Commutation Acts.

I. *Nature of and Incidents to Tithes.*

Tithes are the tenths of the produce of the ground or of personal industry, and are distinguished into prædial, personal, or mixt, and again, according to their value, into great and small. *Prædial tithes* are such as arise immediately from the ground, as grain of all sorts, hay, wood fruits, and herbs. *Mixt tithes* are such as do not arise immediately from the ground, but from things nourished by the ground, as calves, lambs, chickens, colts, milk, cheese, and eggs. *Personal tithes* are such as arise by the industry of man, being the tenth part of the clear gain after charges deducted; and [*152] these are in some places due by custom, and *by 2 & 3 E. 6 are given permanently, but by the statute day-labourers are excepted; so, it seems, servants of the plough;(k) so, an innkeeper by the sale of wine and beer;(l) so, any person for gain made by money put out at interest, or by the sale of a house.(m)

Tithes are again distinguished, according to their value, into great and small: great tithes are tithes of wood, corn, or hay;(n) so, formerly, other herbs planted in large quantities; but it seems now to be settled that tithes are great or small according to the nature of the things, and not according to the mode of cultivation, or the uses to which they are applied, therefore the tithe of beans and peas, whether sown in fields or gardens, are great tithes,(o) and potatoes though sown in large quantities are small tithes.(p)

134. Tithes which came to the Crown by the statutes of dissolution, and are now vested in lay impropriators, are subject to all the laws and incidents of other freehold property, being assets for the payment of debts, and subject to dower and curtesy;(q) so, as lay fees they are tenements within the Statute *de Donis*,(r) and may be entailed and limited to the heir;(s) so, by

(k) 1 Roll. Abr. 646, l. 25. (l) 2 Bulst. 141. (m) 1 Roll. Abr. 656, l. ult.

(n) Cro. Car. 28; Hutt. 77; Palm. 220. (o) Sims v. Bennett, 7 B. P. C. 29.

(p) Smith v. Wyatt, 2 Atk. 364.

(q) Hulne v. Pardoe, McCl. 393; S. C., 3 E. & Y. 116. (r) 1 Inst. 159, a.

(s) Cro. Jac. 391; 1 Vent. 173; R. v. Ellis, 3 Price, 323; S. C., 3 E. & Y. 761.

the 33 H. 8, c. 7, s. 7, recoveries and fines of tithes and other ecclesiastical possessions which were in lay hands might be suffered and levied in the same manner as of lands; but tithes must have been named to pass in such assurances.(*l*)

Being incorporeal hereditaments they pass by grant only, but not without deed;(u) and they cannot be granted by copy unless the custom permits;(v) so, they are not subject *to the customary modes of descent as to [153] gavelkind or borough-English.(x)

Tithes of which a man is seised in fee may be devised as hereditaments;(y) but not under the word "lands,"(z) unless the devise cannot be otherwise interpreted;(a) but it seems not to be settled whether tithes would pass under a devise of a messuage and tenement, "and all the profits arising therefrom at D. in the parish of B.;"(b) but the word "tenements" in a private Act of Parliament includes tithes.(c)

The Will Act, 7 W. 4 & 1 V. c. 26, includes tithes; (see Dig. P. iii. tit. Wills;) and as it relates to all real property will necessarily extend to rent-charges substituted for tithes under the Tithe Commutation Acts.

Tithes are the only incorporeal hereditaments made liable to the poor-rates by the 43 El. (See Dig. P. iii. tit. Poor.) So, a sum of money given under an Inclosure Act to a rector or vicar, in lieu of tithes, which are rateable, is equally rateable;(d) and a vicar is liable to poor-rates for his tithe;(e) so, they are liable to the payment of fruit;(f) but the common law relieves ecclesiastical persons from toll, murage, and pontage,(g) though not, as it seems, from the sewers' rate.(h) Tithes are expressly enumerated among the real property liable to the land-tax in 38 Gt. 3, c. 5.

*By the Tithe Commutation Act, 6 & 7 W. 4, c. 71, the rent-charge substituted for tithes is made liable to the same rates as the [154] tithes have been.

III. To whom due.

135. Tithes of common right belong to the parson of that church within the precincts of whose parish they arise,(i) the limits of which are to be ascertained by reputation,(k) or by the unresisted claims of parochial

(l) Gibson v. Clarke, 1 Jac. & W. 159; 3 E. & Y. 946.

(u) Chave v. Calmel, 3 Burr. 1873.

(v) Hoe v. Taylor, Moor, 355.

(x) Doe v. Llandaff, 2 N. R. 491; S. C. 2 E. & Y. 557.

(y) Ritch v. Sanders, Sty. 261; Swinb. 140.

(z) Perkins v. Wilde, Noy. 95.

(a) Saunders v. Ritch, Sty. 279; Ashton v. Ashton, 1 P. Wms. 386. See also Hobson v. Blackburne, 1 My. & K. 570.

(b) Doe v. Jefferson, 2 Bing. 118; S. C., 2 J. B. Moore, 260.

(c) Powell v. Bull, Com. 265; S. C., 1 E. & Y. 733; R. v. Shingle, 1 Str. 550; S. C., 1 E. & Y. 738. See also Chatfield v. Ruston, 3 B. & C. 863; S. C., 5 D. & R. 695; R. v. Kimbolton, 6 Ad. & Ell. 603, as to tithes under Inclosure Acts.

(d) Lowndes v. Horne, 2 Bl. 1252; S. C., 2 E. & Y. 340. See also R. v. Boldero, 4 B. & C. 467; S. C., 6 D. & R. 557; R. v. Wistow, 5 Ad. & Ell. 250; S. C., 6 Nev. & Man. 567.

(e) R. v. Turner, 1 Str. 77.

(f) 2 Burn's E. L. tit. First Fruits.

(g) 2 Inst. 642.

(h) Callis on Sewers, 131; Com. Dig. Sewers (E. 5). And see Soady v. Wilson, 3 Ad. & Ell. 248, and Dig. P. iii. tit. Sewers.

(i) 2 Inst. 641; Prideaux on Tithes, 302; 2 Comm. 27.

(k) Nichols v. Parker, 14 East, 331.

authorities, or the perambulations whereof are generally made every year;(*l*) but one person may prescribe to have tithes within the parish of another parish, which is called a *portion* of tithes;(*m*) and this is so distinct from the rectory, that if the person having it purchases the rectory, the portion is not extinct, but remains grantable;(*n*) and where a layman or portionist has been long in possession, courts of equity will not disturb the possession, but leave the rector to establish his right at law.(*o*)

As between the parson and the vicar of a parish, all tithes to which the latter cannot prove a title by endowment or prescription belong to the parson;(*p*) and as the tithes do not belong to the vicar *de jure*, endowment will not be presumed, but must be shewn on his part;(*q*) but a vicar has [*155] *the same right to all tithes in his endowment, as a rector has of common right,(*r*) unless a usage to the contrary be shewn;(*r*) but if a vicar have received tithes for many years not mentioned in his endowment, it seems not settled whether a subsequent augmentation or endowment shall be presumed;(*s*) the deed of endowment is not conclusive in questions between rector and vicar.(*t*)

136. Tithes extra-parochial or within the compass of no certain parish belong to the Crown,(*u*) and the title of the Crown is not confined to such extra-parochial lands as were forest or parts of forest land;(*x*) and under a grant of tithes arising from lands *de novo assartatis et assartandis* within the extra-parochial parts of a forest, it was held, that the grantee was not entitled to the tithes of lands in the occupation of the keeper of the forest, nor of lands enclosed by a private person by encroachment upon the forest.(*y*)

The tithes of assart lands in the grant of E. 1 should be confined to such lands as were then assarted or intended shortly so to be, and not be extended to such as should be so in future ages.(*z*) If the queen grants them, her patentee shall have them;(*a*) but by custom a parson or vicar may be entitled to the tithes of extra-parochial lands.(*b*)

By the 2 & 3 E. 6, tithes of cattle depasturing in commons are made payable to the parson or vicar of the parish where the owner of the cattle lives; and by the 17 G. 2, c. 37, where waste lands formerly fens and marshes are drained, and the parish to which they belong cannot be ascertained, the

(*l*) Phill. Ev. 249. See also *Clarke v. Jennings*, 4 Gwill. 1424; *Jenkinson v. Royston*, 5 Price, 504. (*m*) *Gibs*. 663.

(*n*) Sir E. Coke's case, 2 Roll. Rep. 161; 1 Gwill. 375; 1 E. & Y. 314. See also on this point *The Serjeants' case*, Dy. 83 a; 1 Gwill. 119; 1 E. & Y. 51; *Futter v. Bromme*, 4 Co. 34; *Godb.* 35; 1 E. & Y. 86; *Downes v. Moorman*, Bunb. 189; 2 Gwill. 658; 1 E. & Y. 803; *Lewis v. Young*, McClel. 113; S. C., 13 Price, 334; 3 E. & Y. 1135; *Woolley v. Platt*, McClel. 468; S. C., 3 E. & Y. 1063; *Pellatt v. Ferrars*, 2 B. & P. 542; S. C., 2 E. & Y. 494; *Carlisle (Bp.) v. Blain*, 1 Y. & J. 123; *Wyld v. Ward*, 3 Y. & J. 192.

(*o*) *Scott v. Airy*, cited 1 Anstr. 311. See also *Oxenden v. Skinner*, 4 Gwill. 1513.

(*p*) 2 Bulst. 27; *Greene v. Austin*, Cro. Jac. 116; S. C., Yelv. 87.

(*q*) *Greene v. Austen*, sup.; and see *Lady Dartmouth v. Roberts*, 16 East, 334.

(*r*) *Fox v. Ruffy*, Bunb. 87.

(*s*) *Twiss v. Brazen-Nose College (Oxon)*, Hard. 228. (*t*) *Gibs*. 719.

(*u*) 2 Inst. 647; 1 Roll. Abr. 657.

(*x*) Att.-Gen. v. *Eardley (Lord)*, 8 Price, 39; S. C., Dan. 271.

(*y*) *Parry v. Gibbs*, 4 Gwill. 1490. (*z*) *Bond v. Brown*, Bunb. 312.

(*a*) 1 Roll. Abr. 657, l. 15.

(*b*) 14 Il. 4, 17; Sav. 60; Com. Dig. *Dismes*, (E. 3); 1 E. & Y. 29.

tithes arising therefrom are due to the tithe-owner of the parish lying nearest to such lands.

By the common law no one was capable to take tithes in pernaney, but a spiritual person, or the queen, who is **persona mixta*;(c) yet by indirect means a layman may take them, and the lord of the manor [*156] may prescribe to take all tithes within his manor.(d)

By the 27 H. 8, c. 28, patentees of all manors, lands, tenements, tithes, pensions, and other hereditaments to whom such manors, &c. were granted, now called lay impropriators, were to enjoy the same according to the effect of the letters-patent, and were to have the same remedies and the same means of assurance as for temporal possessions; it was held therefore that tithes of a rectory, which belonged to a dissolved abbey, are due to the grantee of the Crown, and not to the incumbent, as rector.(e)

Mere non-payment of a particular tithe is no evidence against a lay rector of a conveyance of that tithe.(f)

IV. By whom payable.

137. All persons generally ought to pay their tithes to whom they are due, for of common right all lands ought to pay tithe;(g) and they were formerly payable by the occupier of the lands, or the lessee;(h) but now by the Tithes Commutation Act, 6 & 7 W. 4, c. 71, the rent-charge, which is substituted for the tithes, is payable by the tenant in the first instance, under all leases made since 13 Aug. 1836, but he is allowed to deduct the same in account with his landlord. This must however be understood to take place in the absence of any stipulation to the contrary, for the Act does not preclude the landlord and tenant from making any other terms upon the subject which they think proper. By another section of the Act a tenant at rack-rent is at liberty to dissent from the payment of the rent-charge, and in that *case the landlord after the commutation is completed is to [*157] take the tithes from the tenant during his tenancy.

If the owner or lessee sold the crop of grass or corn, and the vendee cut it, he was to pay the tithe;(i) but if the owner consumed his herbage, by agistment of the cattle of another, the owner of the cattle was not to pay the tithe.(k) If a parson at common law had enfeoffed another of his glebe, the feoffee paid the tithes, for tithes were not extinguished by unity of possession;(l) so, if the parson leased his glebe, the lessee was to pay the tithes;(l) so, if a parson leased his rectory, he should pay tithes to his lessee for his other lands in the parish;(m) but the effect of the Tithes Commutation Acts is, it is presumed, to make this now for the most part a matter of arrangement between the parties.

(c) 2 Co. 44.

(d) Pigot v. Hearn, Cro. El. 599.

(e) Turner v. Smith, 7 B. P. C. 7. See also Downes v. Moorman, Bunb. 189.

(f) Nagle v. Edwards, 3 Austr. 702; Lord Petre v. Blencoe, Id. 395.

(g) Priddle and Nappier's case, 11 Co. 15.

(h) 2 Bulstr. 184.

(i) 2 Bulst. 184.

(k) 1 Roll. Abr. 636; 1 W. Jo. 254.

(l) Dy. 43; Priddle and Nappier's case, sup.

(m) Moore, 532.

V. What Things are Titheable.

138. The law by which it has been heretofore determined what things were titheable or otherwise must, as soon as the Tithes Commutation Acts come fully into operation, cease to be applicable in practice, and therefore need not to be enlarged upon in this work. By the 6 & 7 W. 4, c. 71, ss. 36, 37, the commissioners are empowered to ascertain the total value of tithes in any parish, in which no previous agreement has been made; and the value of the tithes is to be calculated (after making all just deductions on account of the expenses of collecting, preparing for sale, and marketing, when such tithes have been taken in kind) according to the average of seven years preceding Christmas in the year 1835, unless the tithes have been compounded for or demised, in which case the amount of such composition or the sum agreed to be paid instead of tithes is to be taken as the [*158] clear value. *In the case of hop-grounds, orchards, or gardens, the commissioners are directed by the Act to estimate the value of the tithes thereof according to the average rate of composition for the tithes of hops, fruit, and garden respectively during seven years preceding Christmas in the year 1835 within a district to be assigned in each case; and in the case of coppice-wood, the value of the tithes is to be estimated according to the average value of coppice-wood of the same kind cut during the period of seven years in that and the neighbouring parishes; in the case of inclosures, barren lands, glebe, and lands of any privileged orders, the value of the tithes is to be estimated according to the average value of lands of the like description and quality in that and the neighbouring parishes, estimating the same as chargeable to all parliamentary, parochial, county and other rates and charges and assessments, to which the said tithes are liable, and shall add the value so estimated to the value of the other tithes of the parish so ascertained as aforesaid. As soon as the commissioners have ascertained the total value of all the tithes in the parish they are directed by sect. 50 of the same Act to frame an award, declaring the sum ascertained to be the amount of the rent-charge to be paid in respect of the tithes of the parish; and by sections 33 and 53 valuers are directed to be appointed, whose duty it is to apportion the rent-charge to be paid among the several lands of the parish.

VI. Setting out and carrying away Tithes.

139. Every person was bound before the Tithes Commutation Acts to set out the tithes of his own land, but the manner of doing it was for the most part governed by the custom of the place;(n) yet if the owner would not cut his crop before it was spoiled the parson was without his remedy;(o) and the parson, vicar, impropriator, or farmer *could not come him- [*159] self and set out the the tithes without the license and consent of the owner, and if he did, he would render himself liable to an action of trespass.(p) As this part of the law of tithes will very shortly cease to be in operation, it is not necessary to add anything further on the subject.

(n) Hall v. Mackett, 4 Gwill. 1460.

(o) Godolph. 394.

(p) Degge, p. 2, c. 14.

VII. Exemptions from Tithes.

140. As a rule, one spiritual person does not pay tithes to another, as if a vicar be endowed of glebe and small tithes he shall not pay tithes of his glebe to the parson; (q) so, a parson shall not pay tithe to the vicar for his glebe; (r) so, if a vicar be endowed of small tithes generally, the parson shall not pay small tithes, (s) unless the endowment was of tithe or glebe expressly, according to the maxim, *ecclesiae decimasolvere non debet*, but this maxim applies only as between rector and vicar of the same church; (t) so, the lessee of the parson shall pay small tithe to the vicar; (u) so, if the land comes to the parsonage after the endowment. (v) A spiritual person may prescribe *in non decimando*; (x) so, his lessee; (x) so, the copyholders of a manor may allege a prescription in the bishop, lord of the manor, for their discharge; (y) so, a parson having glebe in another parish. (z)

Regularly no layman can be discharged from the payment of tithes; but to this rule there are several exceptions, and laymen have been discharged four several ways—as 1st. *By the Pope's bull; (a) 2. By prescription; 3. By composition real; and 4. By Act of Parliament. [*160]

Prescription is of two kinds, namely, prescription *in non modo decimandi*, which is a total discharge, and prescription *de modo decimandi*, which is a partial discharge. The queen by her prerogative may prescribe *in non modo decimandi*, for she is *mixta persona*; (b) but without a particular prescription she will not be discharged from tithes for the ancient demesnes of the Crown; (c) so, if she aliens the land the prescription is destroyed; (c) so, a man may prescribe that by the custom of the country no tithes are paid for the milk of ewes; (d) but it is said in the books that a layman may prescribe *de modo decimandi*, but not *in non modo decimandi*, because without special matter shewn it shall not be intended that he has any lawful discharge; (e) so, a man may prescribe to be discharged from the payment of tithes because that a *modus* has been paid time whereof, &c., in lieu of the same tithe, and such *modus* may commence upon a real composition. (f) A real composition was when land was given by a man to a parson with consent of the patron and ordinary, that he might be discharged of all his tithes, and a *modus* was paid in lieu of them, (g) and this discharge went with the land into whatever hands it came. (h)

By Act of Parliament lands in the hands of all religious bodies were discharged by their order from the payment of tithes, and all the lands which belonged to such orders at the time of the dissolution were by force of the statutes in the reign of Hen. 8 declared exempt from tithes, whether in the hands of the King or his patentees; but it has been held that a tenant for life or years is not within the statute for discharging tithes heretofore part of the possessions of a *Cistercian abbey, and a [*161]

(q) *Blenco v. Marston*, Cro. El. 479.

(r) *Moor*, 475.

(s) *Blenco's case*, Cro. El. 578.

(t) *Warden and Canons v. Dean of St. Paul's*, 2 Wils. Excheq. 1; S. C., 4 Price, 65.

(u) *Blenco's case*, sup. (v) *Moor*, 910. (x) *Wright v. Wright*, Cro. El. 475.

(y) *Crouch v. Fryer*, Cro. El. 784. (z) *Roll. Abr.* 653, 1. 30. (a) 2 Inst. 653.

(b) *Moor*, 486; W. Jo. 387.

(c) *Compost v. —*, Hard. 315.

(d) 1 Roll. 654, 1. 15.

(e) *Petre v. Blencoe*, 3 Anstr. 945.

(f) W. Jo. 369; *Moor*, 539.

(g) W. Jo. 369.

(h) *Cro. Car.* 423.

tenant in tail having the inheritance is discharged only while the lands are in his own manurance.(i)

The general view of the law of tithes will, it is presumed, suffice to connect the old and new law, as no questions can be raised on the subject of exemptions when the Tithes Commutation Acts come into full operation, provision being made by the Act for settling all matters of dispute previously. See further, *infra*, § 141 et seq.

VIII. Law of Tithes and Rent-charges under the Tithes Commutation Acts.

141. The Tithes Commutation Acts are four in number, namely, the 6 & 7 W. 4, c. 71, the General Act; 7 W. 4 & 1 V. c. 69, an amendment of the same; 1 & 2 V. c. 64, for facilitating the merger of rent-charges; and the 2 & 3 V. c. 32, another amendment of the General Act. (See Dig. P. i. tit. Tithes.) These statutes are to be considered as one enactment, the object of which is to substitute a corn-rent, payable in money, and permanent in quantity, though fluctuating in value, for all tithes, the same to be payable in the nature of a rent-charge issuing out of the land charged therewith, by two equal half-yearly payments on the 1st July and 1st January in every year.

The law of tithes and rent-charges under and since these statutes respect, 1. The apportionment of the rent-charge; 2. The recovery of the rent-charge; 3. The rateability of the rent-charge; 4. Merger of the rent-charge; 5. Other incidents to the rent-charge; 6. Extent of the Tithes Commutation Acts as to rent-charges.

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*1. *Apportionment of the Rent-charge.*

142. The apportionment of the rent-charge under these Acts is of two kinds, namely, that which respects the land, and that which respects the person entitled to the rent charge.

As to the first of these apportionments: the 6 & 7 W. 4, c. 71, s. 33, directs that the total sum to be paid by way of rent-charge instead of tithes, shall be apportioned amongst the several lands in the parish, having regard to the average titheable produce and productive quality of the lands, so that in each case the several lands shall have the full benefit of every modus and composition real, prescriptive, and customary payment, and of every exemption from, or non-liability to tithes relating to the said lands respectively, and having regard to the several tithes to which the said lands are severally liable. By sect. 58 the rent-charge intended to be charged upon any lands may, before the confirmation of the apportionment, at the request of the owner thereof, be specially apportioned upon particular lands, in such manner and proportion as he, with the consent of the person entitled to the rent-charge may direct; and by sect. 72, the Commissioners of the Land-tax are empowered, with the consent of two justices and at the request of the land-owners, to alter the apportionment. By sect. 55, a

(i) *Wilson v. Redman*, Hard. 174; Archb. of Canterbury's case, 2 Co. 46.

draught of every apportionment is to be made, which is to state the name or description and the true or estimated quantity in statute measure of the several lands to be comprised in the apportionment, and to set forth the names and description of the proprietors and occupiers, and whether the lands are cultivated as arable, meadow, or pasture land, or as woodland, common land, or howsoever otherwise, and to refer, by a number set against the description of such lands, to a map or plan; and such draught shall also state the amount charged upon the said several lands, and to whom and in what right the same shall be respectively payable.

*143. By the 4 & 5 W. 4, c. 22, s. 2, it is provided, that all rent-charges, moduses, compositions, &c., shall be apportioned in such [*163] manner on the death of any person interested therein, and the executors and administrators of such person shall be entitled to a proportion of such rents, &c., according to the time which has elapsed since the last periodical payment up to the day of the death; and as by sect. 86 of the 6 and 7 W. 4, c. 71, the provisions of that Act are made to extend to all rent-charges under this Tithes Commutation Act, it follows, that if the interest of the owner of the rent-charge should cease before the 1st January or 1st July, (the appointed times of payment,) such owner or his representative will be entitled to a proportional part of the rent-charge for the time which may have elapsed from the last day of payment to the time of his interest determining.

2. *Recovery of the Rent-charge.*

144. At the common law there was no distress for tithes, but the 7 & 8 W. 3, c. 34; 1 G. 1, st. 2, c. 6; 53 G. 3, c. 127, s. 6; 5 & 6 W. 4, c. 74, give summary powers to justices to enforce the payment of tithes against Quakers. By the 6 & 7 W. 4, c. 71, ss. 81, 82, the mode of recovering the rent-charge in arrear is by distraining for it in the same manner as a landlord recovers rent in arrear. Such power is given to the owner at the expiration of twenty-one days after any half-yearly day of payment, but not more than two years' arrears shall at any time be recoverable by distress; by which provision the law is so far altered that where, by an Inclosure Act, a corn-rent was made payable in lieu of tithes, the landlord was held liable to the payment of the same during all the time that he was legally in possession of lands.^(k) As a further remedy for the recovery of arrears, after forty days, possession of the land may be given to the owner of the rent-charge until the arrears *and costs are satisfied. The remedy of distress is also extended to Quakers, whose goods may be distrained wherever found, [*164] whether on the premises or elsewhere; but the Act directs, that, in all cases of distress upon the goods of such persons, they may be sold without the necessity, as in the case of other persons, of their being impounded for the five days.

3. *Rateability of Rent-charges.*

145. By sect. 69 of 6 & 7 W. 4, c. 71, every rent-charge payable in lieu of

^(k) *Newling v. Pearse*, 1 B. & C. 437; S. C., 3 E. & Y. 1094.

tithes is liable to the same rates as tithes have been; and as to what rates and taxes tithes were liable to, see further, ante, § 134.

4. *Merger of Rent-charge.*

146. The power of merging rent-charges, payable in lieu of tithes, is altogether new, and applies of course only to impropriate tithes; by sect. 71 of 6 & 7 W. 4, c. 71, tenants, in fee-simple or fee-tail, who are possessed of both the land and the tithes or of any rent-charge in lieu of tithes, are enabled by any deed or declaration under their hands or seals, to be made in such form as the Tithe Commissioners approve of, to release, assign, or otherwise dispose of the rent-charge, so that the same may be absolutely merged and extinguished in the freehold and inheritance of the land on which the same has been charged. This power was extended by the 1 & 2 V. c. 64 to all person having powers of appointment over the fee-simple of tithes or rent-charge, and also to tenants for life, in cases where the tithes or rent-charge and the lands are settled to the same uses, and to copyhold as well as freehold.

By sect. 1 of 2 & 3 V. c. 62, it is provided, that on the merger of tithes or rent-charge the lands in which such merger takes effect shall be subject to any charge, incumbrance, or liability which lawfully existed on such tithes or rent-charge. Among the charges to which tithes were liable [*165] *may be reckoned the liability to the repairs of the chancel, stipends of ministers, fee-farm rents, and the like; and by sect. 2 of this last Act no deed or declaration for the merger of tithes shall be chargeable with stamp duty. By sect. 7 of 2 & 3 V. c. 62, tithes or rent-charge of glebe land may be merged.

5. *Incidents to Tithes and Rent-charges.*

147. By sect. 71 of 6 & 7 W. 4, c. 71, rent-charges are made subject to the same incumbrances and incidents as tithes were before this Act, and persons are to have the same remedies for recovering the same as if their right had accrued after the commutation; but it is provided that nothing in the Act should give validity to any mortgage or other incumbrance which before the passing of the Act was invalid or could not be enforced. The mortgages and incumbrances here referred particularly to, are the chargings upon benefices prohibited by 13 El. c. 20. See Dig. P. i. ii. tit. Benefice.

By the same section it is provided that every estate for life or other greater estate shall be taken to be an estate of freehold, and every estate in such rent-charge shall be subject to the same liabilities and incidents as the like estate in the tithes commuted for such rent-charge; and where any lands were exempted from tithe while in the occupation of the owner thereof by reason of being glebe, or of having been heretofore parcel of the possessions of any privileged order, the same lands shall be in like manner exempted from the payment of the rent-charge apportioned on them whilst in the occupation of the owner thereof; and where by any Act of Parliament as in the case of redeeming the land-tax, (see Dig. P. i. tit. Land-tax,) and mortgaging benefices under 17 G. 3, c. 53, (see Dig. P. i. ii. tit. Bene-

fices) any tithes are authorized to be sold or otherwise, the rent-charges for which they are commuted are to be in like manner sold or otherwise.

**6. Extent of the Tithes Commutation Acts as to Rent-charges. [*166]*

148. By the 6 & 7 W. 4, c. 71, ss. 26, 27, 28, provisions are made for giving land in lieu of tithes to ecclesiastical persons, but not to lay impropiators. Not more than twenty acres of land may be so given in exchange, and the same is to be effected by an agreement which is to operate as a conveyance, and the lands so given in exchange are to be subject to the same uses and trusts as the tithes were subject to. By this Act land in lieu of tithes could not be given after the confirmation of the apportionment, but by the 2 & 3 V. c. 62 such exchanges may be made at any time while the commission lasts.

Easter offerings, mortuaries, surplice fees, tithes of fish or of fishing, and all personal tithes other than the tithes of mills or mineral tithes, are excluded from the operation of the 6 & 7 W. 4, c. 71, unless by some special provision to be inserted in any parochial agreement; but the 2 & 3 V. c. 62, s. 6, empowers land-owners and tithe-owners before the confirmation of any apportionment, after a compulsory award, to enter into an agreement for the commutation of such Easter offerings, &c.

Tithes in London, which are regulated first by an ancient constitution of the church and afterwards by the 22 & 23 Car. 2, c. 15, are excepted from all other Acts on the subject of tithes. See further Burn's E. L., Phillimore's ed., tit. Tithes; Bosanquet's Tithes Commutation Act; Shelford on the Tithes Commutation Acts.

***SECTION IV.**

[*167]

RENT.

§ 149. The word "rent" signifies properly a return, and may be defined a return in acknowledgment given for the possession of some corporeal hereditament, or in other words "an annual return made by the tenant in labour, money, or provisions, as a retribution for the land enjoyed."⁽¹⁾ The subject of rent may be considered under the following heads:—

1. The nature and different kinds of rent;
2. Creation and reservation of rent;
3. What estates may be had in a rent;
4. Payment of rent;
5. Extinguishment and suspension of rent;
6. Apportionment of rent;
7. Recovery of rent.

(1) Gilb. on Rents, 9.

I. Nature of Rent and its different Kinds.

§ 150. Need not be Money. Must be something certain. Must not be Parcel of the Profits. Nor a Sum in gross.	§ 154. Other Rents : Rack-rent. Rents of Assize. Chief Rents. Quit-rents. Viscontiel Rents.
151. Different Kinds of Rent. Rent-service.	155. Fines. Nomine Pænæ, or Penal Rent.
153. Rent-charge. What good as a Rent-charge.	
153. Rent-sock.	

150. Although a rent must be a return of profit, yet it need not be a sum of money, as it usually is, for it may be in hawks, capons, corn, or other profit lying in render; (*m*) or it may be in an office, or attendance. (*m*) It must *however be a something certain, and therefore where a man [*168] demised rendering rent "after the rate of £ per ann.," this was held void because it did not appear what rent should be paid in certain. (*n*) (1) But if it can be reduced to a certainty it will be sufficient. (*o*) (2)

So, a rent must not be parcel of the annual profits themselves, as the vesture or herbage of the land or the like; (*p*) (3) and where it is a corn-rent, as in the case of hospital leases, and the *reddendum* is "so many quarters of corn," it will be understood to mean legal quarters, reckoning the bushel at eight gallons. (*q*)

So, where a sum of money is made payable for goodwill over and above the rent, this additional sum, though payable annually, was not to be considered as rent, only as a sum in gross; (*r*) so, if A. enfeoff B. upon condition that B. and his heirs shall render to C. and his heirs a yearly rent of 10s., and if he fail of payment, it shall be lawful for A. and his heirs to re-enter, this is not in nature of any sort of rent, but a sum in gross, which the feoffee is obliged to pay, to prevent the re-entry of the feoffor, for at common law it could not be good as a rent-service, because nothing passed from C. for which a retribution ought to be made; (*s*) so, where a sum is agreed to be paid annually it will not be deemed rent, so as to subject the

(*m*) 1 Inst. 142.

(*n*) Parke v. Harris, 1 Salk. 262; S. C., 4 Mod. 79.

(*o*) Litt., s. 136; 1 Inst. 96, a.; 142, a.

(*p*) 1 Inst. 142, a.

(*q*) St. Cross (Master, &c.) v. Howard, 6 T. R. 338.

(*r*) Smith v. Mapleback, 1 T. R. 441.

(*s*) Litt., s. 345.

(1) Wiles v. Hornish, 3 Penna., 30; the remedy is for use and occupation. Valentine v. Jackson, 9 Wend. 302. Jacks v. Smith, 1 Bay, 315.

(2) As a rent of a mill for one third the toll; Frey v. Jones, 2 Raw. 11; and payment of taxes and daubing and chinking a house of certain dimensions. Shaffer v. Sutton, 5 Binn. 228.

(3) But it is a good rent to reserve a share of the grain; such a rent passes with the reversion, Johnston v. Smith, 3 Penna. 496; but it would seem to have been deliverable after cutting, &c. Where it is to be delivered in the bushel, the landlord has no title until delivered, and he may only distrain, Rinehart v. Olwine, 5 W. & S. 163. So if payable in iron, it may be distrained for. Jones v. Gundrim, 3 W. & S. 531.

But a contract to work the land on shares, that is, dividing the produce, is not a lease, and the owner has title to his share of the grain. Bishop v. Doty, 1 Vermt. 33, and Foote v. Colvin 3 Johns. 221. Where it is reserved as *rent*, even though uncertain in quantity, it is rent. Hoskins v. Rhodes, 1 Gill & Johns. 266; Stewart v. Dougherty, 9 Johns. 113.

party to distress, where the relation of landlord and tenant does not exist ;(*t*) but when it appears to be the intention of the parties, money will be deemed to be rent, which is agreed to be paid upon a lease, although the relation of landlord and tenant have not actually commenced.(*u*)

*151. At common law there were three kinds of rent, namely, rent-service, rent-charge, and rent-seck. [*169]

Rent-service is said to be where the tenant holds his land by fealty and certain rent,(*x*) and this is properly what is now understood by the word "rent." It was formerly so called because the return consisted in some corporal service, as ploughing the lord's land. To this kind of rent distress is inseparably incident, and for that reason it is absolutely necessary that the rent should be certain, otherwise the lessor cannot distrain ;(*y*)(1) but if a man make a lease for life, or gift in tail, he must save the reversion to himself, or he will not have the remedy by distress.(*z*)(2) unless there be a clause in the deed reserving a power of distress ; in that case it will be a rent-charge, because the land is charged with such distress by force of the writing only, and not of common right.(*a*)(3)

152. A rent-charge is any rent granted out of lands by deed with a clause of distress, whence it derives its name, because the land is charged with distress by the express provision of the parties, which it would not otherwise be.(4) In this manner a man may make over to another the whole of his estate, with a certain rent payable thereout ; and although he reserve to himself no reversion, he may yet retain his remedy by distress.(*b*) So

(*t*) Oates v. Frith, Hob. 130. See also Hoby v. Roebuck, 7 Taunt. 157 ; S. C., 2 Marsh 433 ; Donellan v. Read, 3 B. & Ad. 899 ; Lambert v. Norris, 2 M. & W. 333.

(*u*) London (City) v. Dias, Woodf. L. and T. 275, 4th ed.

(*x*) Litt., s. 213. (*y*) Id., s. 136. (*z*) Ib. Walsal v. Heath, Cro. El. 656.

(*a*) Litt., s. 217. (*b*) Ib., 2 Comm. 42.

(1) Vide n. 1, 168, ante.

(2) Cornell v. Lamb, 2 Cow. 652.

(3) Rents-service exist in Pennsylvania, with all the incidents of that estate. They are generally reserved on conveyances in fee ; that they must be reserved on a conveyance of the land, and not granted out of the land, is plain, or they would be rents-charge. Cuthbert v. Kuhn, 3 Whart. 365. But by the Statute of *Quia Emptores*, wherever that has extended, a conveyance of the fee left no estate or possibility, sometimes called an escheat or seignory, in the grantor, and a rent reserved on such a conveyance was converted into a rent-charge. That statute not being in force in Pennsylvania, the rents retain their original character. Ingersoll v. Sergeant, 1 Whart. 352. And though it has been correctly said no reversion remains, Robb v. Beaver, 8 W. & S. 126, for there never could be any after a fee simple, yet the same species of estate does remain which existed at common law before the statute. This is plainly shown by a number of cases ; thus in that last cited it was said fealty was due ; in the same way it is supposed, as is every where recognised between lessor and lessee for years, also a right of distress of common right, Kenegre v. Elliot, 9 W. 262, which are incidents only in case of tenure ; to constitute which, such an estate as has been mentioned must exist. So also covenant for payment of the rent will lie by the assignee of the grantor ; Streaper v. Fisher, 1 Raw. 155 ; Miles v. St. Mary's Church, 1 Whart. 229, not for the reason given in the former case, but by reason of the right or estate accompanying the grant ; this point is fully considered in a note to Spencer's case, Smith's Leading Cases, 1 vol. 97, Am. ed. The existence of this rent moreover, depends on the continuance of the estate of the grantor, being a consideration therefore. Francis v. Reigart, 4 W. 116. And an eviction without default of the grantor, as by the authority of the State for public use, creates an apportionment ; Cuthbert v. Kuhn, ante. So by a sale of the land, after a levy on the rent, it passes ; Streaper v. Fisher, ante.

(4) Cuthbert v. Kuhn, 3 Wh. 365. And the rule was thus in New York, People v. Haskins, 7 Wend. 463, 9, until the remedy was extended by statute, 3 Kent's Com. 461.

*2 Eng. Com. Law Reps. 57. *23 Id. 215.

if a man makes a feoffment in fee by deed-poll reserving rent, and provides, that if the rent be behind, it shall be lawful for him to distrain, this will be a rent-charge, the words amounting to a grant from the feoffee; (c) for a reservation in a deed-poll is good, because whoever claims any estate under a deed must take it on the terms expressed in the grant; (d) so, if a man seised of lands in fee bind his goods and lands to the payment of a yearly [*170] *sum to A., this is a good rent-charge with power to distrain, although there be no express words of charge, nor to distrain. (e)

So a rent granted by parol by one co-parcener to another for equality of partition was good as a rent-charge, and she might distrain for the same, because co-parceners are in by descent, and are compellable to make partition, and therefore such a rent, though made without deed, would before the 7 & 8 V. c. 76 (f) not have been construed a rent-seck, so as to deprive the party of her remedy by distress; (f) and for the same reason where a rent was granted to a widow without deed out of the land whereof she was dowable, she might, nevertheless distrain for the same. (g) A rent-charge may now be created either by grant or by the Statute of Uses, and the statute has been construed to extend to all rents that might hereafter be granted to the use of any one. (h)

153. A rent-seck was properly a rent reserved by deed without any clause of distress, and it was so called because it was *primâ facie* barren or unprofitable to the grantee, as, until seisin had, he had no remedy for it; (i) but this distinction is now done away by the 4 Geo. 2, c. 238, which gives the same remedy for rent-seck as for other rents. (1)

154. To the above may be added some particular kinds of rents, as fee-farm rents, rack-rent, rents of assize or chief rents, quit-rents, and viscontiel rents. A fee-farm rent is a rent-charge [or it is said that it might be a rent-seck (k)] issuing out of an estate in fee, which it is said must be of at least [*171] one-fourth of the value of the land. (l) After the Statute *of *Quia Emptores*, granting in fee-farm, except by the king, became impracticable, but it is possible to reserve a rent in fee which may be good as a rent-charge. (m)

A rack-rent is only a rent of the full value of the tenement, or nearly so. (n)

Rents of assize are the established rents of the freeholders and copyholders of a manor; they are termed chief-rents when payable by the freeholders, and quit-rents when payable by either freeholders or copyholders, so called

(c) Plowd. 134.

(d) 1 Inst. 143, b.; 2 Roll. Abr. 449.

(e) 1 Inst. 147, a.

(f) See *Præc. Conv.*, Append. No. xviii.

(g) 1 Inst. 169, a.

(h) Bacon on Uses, 43; *Rivett v. Godson*, W. Jo. 179.

(i) Litt., s. 218; 1 Inst. 153.

(k) 2 Doug. 605.

(l) Bract. 86; Britt. 164, b.; F. N. B. 86; 1 Inst. 144, a.; and see also *Harg. Co. Litt.*, 144, a., n. (5).

(m) *Harg. Co. Litt.*, sup. See also *Bradbury v. Wright*, 2 Dougl. 602.

(n) 2 Comm. 42.

(1) The want of a reversion remaining was recognised as destroying the right of distress in *Ege v. Ege*, 5 W. 138; and in *Diehtenthaler v. Thompson*, 13 S. & R. 157, the cessation of the title as landlord produced the same effect; and though fealty or other feudal incidents may be taken away, yet the right of distress remains as before. *Cornell v. Lamb*, 2 Cow. 657. The right of distress is extended to these rents in N. Y. by statute. *Rev. Stat. T. 747 § 18-22.* 3 *Kent's Com.* 461.

because the tenant thereby gets quit and free of all other services.(o) Payment of a rent to the lord of a manor for a series of years is evidence only a title to the rent, but not to the land in respect of which the rent is paid;(p) the presumption, however is, that such a rent is a quit-rent.(p)

Viscontiel rents are such as were formerly received by the sheriff before the 3 & 4 Wm. 4, c. 99, which relieves him from accounting for such rents. (See Dig. P. i. tit. Accounts.) All these rents are continued, with other manorial rights, by the 12 C. 2, c. 24, s. 5, which abolishes military tenures.

155. There is also another kind of rent which is sometimes called fore-hand rent, or foregift, but more usually a fine, which is a premium given by the tenant at the time of taking the lease, as on the renewal of leases by ecclesiastical corporations, which is considered in the nature of an improved rent.(q)

Sometimes a covenant is inserted in leases, that the lessee shall forfeit a certain sum on non-payment of rent, or on doing certain things, as ploughing up ancient meadow *and the like. This is called a *nomine pœnæ*, [*172] or a penal rent, and being incident to the rent is said to descend to the heir.(r)

II. Creation and Reservation of Rent.

1. By what words and in what manner Rent may be reserved.

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| §157. Mode of reserving a Rent-service. | §158. Several Rents reserved in the same Deed. |
| 159. Reservation of a Rent-charge. | |

2. To whom the Reservation may be made.

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| 160. To the Feoffor, &c. | 163. Particular reservations. |
| 161. To the Lessor himself. | 165. Between Joint-Tenants. |
| 162. General Reservation. | To Husband and Wife. |

3. Upon what Conveyances Rent may be reserved.

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| 166. On Conveyances generally.
Not where no Estate passes.
Where an Estate is confirmed. | 169. Rent not to be reserved, when.
Conveyance that enures by way of
Extinguishment. |
| 167. On a Bargain and Sale. | Feoffment. |
| 168. Distinction between a Lease and a Feoffment. | Agreement for a Lease.
Fines. |

4. Upon what things Rent may be reserved, or out of what it may issue.

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| 170. General Rule.
Rent may issue out of corporeal
Things. | 171. But not out of incorporeal Hereditaments.
Commons. |
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(o) 1 Inst. 144, a.; Gilb. on Rents, 33.

(p) Doc v. Johnson, Gow, 173.

(q) See Irish Society v. Needham, 1 T. R. 436; Wynne v. Bampton, 3 Atk. 473; Southall v. Leidbetter, 3 T. R. 461, 462.

(r) Inst. 162. But see Thinn v. Chomley, Cro. El. 333; Egerton v. Sheafe, 2 Lutw. 1151.

172. Tithes.	
Not to issue out of a Hundred.	Not out of a Term for Years.
Not out of Rent.	173. Exceptions.
	174. The Crown.

5. *Reservations upon Leases made under Powers.*

175. Amount of Rent.	177. Time of Payment.
176. Mode of Reservation.	Entire or distinct.
177. Rent must be certain.	Reservations.

§156. Under this head may be considered—1. By what words and in what manner a rent may be created or reserved; *2. To whom the [*173] reservation may be made; 3. Upon what conveyances rent may be made; 4. Upon what things reservation may be made, or out of what rent may issue; 5. Reservations in leases made under powers.

1. *By what Words and in what Manner a Rent may be created or reserved.*

157. The creation or reservation of rent may be considered as respects a rent-service or a rent-charge.

A rent-service, being something in retribution for the land demised, must be reserved by such words as imply a return of something which was not in the grantor before, in lieu of the land given, and therefore is properly reserved by the words *reservando. reddendo, &c.*; (s) so, the words in a demise “provided the lessee shall pay” are a good reservation; (t) so, if lands be leased to A., and he covenant and grant to render and pay for the said lands every year during the said term £10, this amounts to a reservation; (u) so if a man, in consideration of rent after mentioned, lets, and the lessee covenants to pay so much rent, without any *reddendum*, it will be a good reservation. (x) (1)

But if a lease be made “excepting” so much rent, this will not be a good reservation, because this word implies a reservation to the lessor of something then in his possession, and which would otherwise pass by the lease; (y) so, if a man makes a lease “saving” 20s. rent, this is not a good reservation, because there can be no saving of anything not in being. (z)

158. Where several rents are reserved in the same deed there is this difference, that where the rent is reserved *entire in the *reddendum*, [*174] there though the rent be after apportioned to the several parcels

(s) Plowd. 142; 1 Inst. 47, a.; Gilb. on Rents, 30.

(t) Harrington v. Wise, Cro. El. 486; S. C., Moor, 459.

(u) Plowd. 31; Hob. 35; Drake v. Munday, Cro. Car. 297; S. C., W. Jo. 231. See also Moor, 861; Noy, 14; Palm. 20; Cro. Jac. 34, 42, &c.; Roll. Rep. 80; 2 Bulst. 281.

(x) Moor, 459; 2 Roll. Abr. 449, l. 35, 40. (y) Perk., s. 639. (z) 2 Roll. Abr. 449.

(1) Mem. That A. hath let to B. and his heirs at the rate of \$15 per acre to be paid by B. and his heirs, creates a rent-service. Krider v. Lafferty, 1 Whart. 304. Whatever words are sufficient to explain the intent of the parties that one should divest himself of the property and the other come into it for a determinate period, whether they run in the form of a license, covenant or agreement, will in construction of law amount to a lease, as if the most proper words had been used. Watson v. O'Hern, 6 W. 363.

leased, yet the reservation shall be taken as one and entire, but it is otherwise where the rent is not reserved entire, for then the rent is several and apportioned to the several things demised; (a) and as there may be several reservations in the same lease by the words of the parties, so there may be by act of law, as where a lease for life is made to a bishop in his public capacity, and to J. S., reserving a rent; the lessees in that case are not joint-tenants, but tenants in common, and therefore the reservation of the rent must be several too, and the reversion to which the rent is incident must follow the nature of the particular estates on which it depends; (b) so, if there be two tenants in common, and they make a lease for life rendering rent, this reservation, though made by joint words, shall follow the nature of the reversion, which is several in the lessors, and therefore it has been held, that they should be put to their several assizes, if they had been dis-
seised, as if there had been distinct reservations. (c)

159. The usual and proper way of creating a rent-charge is, in the words of Littleton, "When a man seised of lands grants, by deed-poll or indenture, a yearly rent issuing out of the same land, to another in fee, in tail or for life, with a clause of distress, this is a rent-charge;" (d) and even since the Statute of *Quia Emptores*, if a man make a feoffment in fee, reserving rent, and if the rent be behind, that it shall be lawful for him to distrain, it is a rent-charge; and so the law creates a rent-charge in many other cases where there are no words of granting, it being the design of the law to render contracts binding, so far as the intention of the parties may be collected from the deed; (e) (1) *therefore, if a man bind himself to J. S. in an annual rent, to be yearly issuing out of such a manor, and subject the [*175] said manor and all the chattels therein to a distress, this amounts to a good grant of the rent, and J. S. may distrain for it; (f) but if a man grant a rent of 40s. out of the manor of D., and if the rent be behind that the grantee shall distrain in the manor of S., this power of distress out of the manor will not amount to the grant of a rent-charge out of such manor, for here is a plain grant of rent out of the manor D., and the distress is given in S. only as a means for the recovery of it. (g)

But if a rent be granted to A., and that if the rent be behind a stranger shall distrain for it for the use of the grantee, this is a good grant of a rent-charge to A., the power of distress being given to the stranger for his benefit; (h) so, if A. leases a manor for life, rendering rent, and afterwards grants this rent in fee to another, to have after the death of tenant for life, with power to distrain for it, this is a good grant of a rent charge in fee; (h) so, if A. grant to B. a rent of £5, to be taken out of his lands, which rent A. has of the grant of his father, though A. had never such rent from the grant of his father, yet this grant of A.'s shall be good to create a rent-charge in B., and a mistake in the description of the thing referred to shall not render the contract ineffectual. (i)

(a) Dy. 309; Hob. 172; Moor, 51, 199; 1 Anders. 173; 3 Leon. 124.

(b) Moor, 292. (c) 1 Inst. 207, a. (d) Litt., s. 218. (e) Plowd. 134; 1 Inst. 170, a.

(f) Roll. Abr. 424. (g) Butt's case, 7 Co. 24; 1 Inst. 147, a.; 2 Roll. Abr. 425.

(h) 2 Roll. Abr. 425. (i) Bro. tit. Grant, 67, 73; 2 Roll. Abr. 425.

(1) Can only be created in Pennsylvania by a grant of an annual sum of land with a clause of distress. *Cuthbert v. Kuhn*, 3 Whart. 357.

Again, if a man seised of twenty acres of land grant a rent of 20s. to be issuing out of a certain acre of his land, or out of every acre of his land, this is in the nature of a several grant out of every acre, for the grant shall be taken most strongly against the grantor, and the grantee shall have 20s. out of each acre; *(j)* and so, if there be two tenants in common, and they grant a rent of 20s. *per annum* out of their land, the grantee shall have 40s. rent; for [*176] ^{*as their estate is several, so shall their grant be too, and therefore} each shall be taken to grant a several rent of 20s. *(k)*

2. To whom the reservation may be made.

160. As a rule, no rent (which is properly said to be rent) may be reserved to any but the feoffor, donor, lessor, or his heirs, and in no manner may it be reserved to a stranger, *(l)* (1) for it ought to be made to him from whom the land passes; *(l)* therefore, if a father seised in fee leases rendering rent to his son, it is void, for the son takes as a purchaser, and is *quasi* a stranger; it should therefore be to the heir of the lessor; *(m)* but if a man makes a lease to commence after his death, reserving rent to his heirs, this will be deemed a good rent-service arising in the heir, not by way of purchase, but as incident to the reversion descending to the heir, and therefore may be released by the ancestor during his life, which it could not be, if it was a new purchase in the heir. *(n)* So, a man may reserve a rent to himself for life and a different rent to his heir, *(o)* or he may reserve rent to his heir omitting himself. *(o)*

The Queen is an exception to this rule, for she may make reservation of rent to a stranger; *(p)* therefore, where the King made a lease of a house belonging to his housekeeper of Whitehall, reserving a rent to the housekeeper for the time being, though in this case it was admitted that the King might reserve rent to a stranger, yet, it being here made to an officer who was removable at will, the reservation was held ill. *(q)*

161. As a lessor can reserve rent to no other than to himself, if two joint [*177] tenants made a lease by parol or deed-poll, ^{*reserving rent to one of} them, this should enure to them both; but if so reserved by deed indented, it should enure to him alone by way of conclusion; *(r)* and the reason for the difference is this, that when the lease is by deed-poll, the rent shall follow the reversion, which is jointly in both lessors; but where the lease is by indenture, the parties are estopped to claim the rent in any other manner than as it is reserved by the deed, because the indenture is the deed of each party, and no man shall be allowed to recede from or vary his own solemn act. *(s)*

162. A reservation may be either general or particular.

Where a reservation of the rent is general, the law directs that it shall be

(j) 1 Inst. 147.

(k) Plowd. 140, 161; Justice Wyndham's case, 5 Co. 7 b.; 1 Inst. 197, a, 267, b.

(l) 1 Inst. 143, b; Gilb. on Rents, 45.

(m) Oates v. Friith, Hob. 139; 1 Inst. 47, a, 143, b; Sacheverell v. Froggatt, 2 Saund. 370. *(n)* 2 Roll. Abr. 417; and see 2 Saund. 370. *(o)* 1 Inst. 213.

(p) 1 Inst. 143; 2 Roll. Abr. 417.

(q) Anon., 1 Id. Raym. 36.

(r) 1 Inst. 47, a.

(s) Sacheverell v. Froggatt, 1 Vent. 161; 2 Roll. Abr. 417.

carried over according to the intent and the nature of the thing demised ;(*t*) (1) therefore if a tenant in tail makes a lease for years, rendering rent to him and his heirs, it was held, that the rent should go to the heir in tail along with the reversion, for the law uses all industry imaginable to conform the reservation to the estate ;(*t*) so, where tenant for life, with several limitations over and with power to make leases, demises, reserving rent to him and his heirs, it was adjudged that it should belong to him in remainder ;(*u*) so, where the words are general, they will be expanded according to law ; therefore, if tenant in tail to him and the heirs male of the body of his father lets the land, rendering rent to him, his heirs and assigns, the rent shall go to the heir male of the body of the father, though he be not heir to the lessor, for it is incident to the reversion.(*v*)

163. Where the reservation is particular, as to the lessor, without going further, or to the lessor and his assigns, there it is said that the rent shall determine with his death, though the lease upon which it is reserved be still continuing, for *the reservation is good only during his life, [**178*] and it shall never be carried further than the period of time the lessor himself has fixed for it ;(*x*) but upon this point there is some diversity in the books, see 10 E. 4, 18 ; 1 Dy. 45 a. ; 1 Inst. 47 a. ; for Littleton in the case cited was of a contrary opinion, and held that "if I let land to a man for a term of years, rendering to me a certain rent, without saying and to my heirs, yet if I die within the term, my heir shall have the rent, for it is annexed to the reversion, which is descended to my heir."(*y*)

So, where a man makes a lease, reserving a rent in the alternative to him or his heirs, held, that the rent determined at his death ;(*z*) *sed secus* where an abbot made a lease reserving rent to him or his successor during the term.(*a*)

164. Where the reservation is special and to improper persons, there the law follows the words ; therefore if rent is reserved to the lessor and his executors, he having the freehold, it will determine at his death, because the reversion, to which the rent is incident, descends to the heir ;(*b*) so, if a lease be made of a term for years, reserving rent to the lessor and his heirs, such rent will determine by the death of the lessor, for the heir cannot have it, as he cannot succeed to the estate, being only a chattel, and the executor cannot have it, there being no words to carry it to him.(*c*) But the words "during the term" have been held sufficient to carry the rent to the heir,

(*t*) *Sacheverell v. Froggatt*, sup.

(*v*) *Cother v. Merrick*, Hardr. 91, 95.

(*y*) 10 E. 4, 18. See also *Noy*, 96 ; *Sury v. Brown*, Latch. 100 ; S. C., 2 Roll. Abr. 451.

See further, *infra*, § 164.

(*a*) *Mallory's case*, Cro. El. 804.

(*c*) 1 Inst. 47, a. ; *Sacheverell v. Froggatt*, 1 Vent. 161.

(*x*) *Whitlock's case*, 8 Co. 70 b.

(*x*) *Ib.* 91.

(*z*) 1 Inst. 214.

(*b*) 2 Roll. Abr. 450.

(1) *Johnston v. Smith*, 3 Penna. 500. It is not essentially annexed to a reversion : thus where a tenant for life leased to the reversioner, there is no merger, but covenant lies, *M. Murphy v. Minot*, 4 N. H. 251 ; and it is not severed by a marriage with a feme lessor for years, but the rent reserved passes with the reversion. *Condie v. Neighbor*, 8 Green. 83. Nor can it be separated by an execution creditor ; he must extend the fee in the land and the rent will pass as an incident to it. *Montague v. Gay*, 17 Mass. 439.

where the lessor was seised in fee, *(d)* and for the same reason if a termor for fifty years leases for twenty-five years, though reserving rent to him and his heirs during the term, yet the executors shall have the rent; *(e)* *(1)* so, [*179] where no reversion is left in the lessor, and the *rent is reserved to his executors, administrators, and assigns, it will go to them and not to the heir; *(f)* but if the reservation be to the lessor and to such persons to whom the reversion and inheritance belong during the term, this is a good reservation to those in remainder, and the law will distribute the rent according to the several interests under the settlement. *(g)*

165. If two joint tenants, the one for life and the other in fee, join in a lease for life or a gift in tail, reserving rent, the rent shall enure to them both, for, if the particular estate determine, they shall be joint tenants again in possession; *(h)* but if tenant for life and he in the reversion join in a lease for life, reserving rent, this shall enure to the tenant for life only during his life, and after to him in the reversion. *(h)*

Where husband possessed of a term for years in his own right joins with his wife in an assignment of the term, reserving rent to him and his wife, and the survivor of them, but the wife neither signed nor sealed the deed, it was held that this rent determined by the death of the husband, because she had no interest in the land; *(i)* but where A. in pursuance of a power in his marriage settlement made leases of several parts of his estate which were settled on his wife, it was held that the rent should go to the jointress as incident to the reversion, *(j)* see further, as to whom rent is payable, post, § 197.

3. Upon what Conveyances Rent may be reserved.

166. Rents are usually reserved on leases, but they may be reserved upon every conveyance, that either passes an estate to the tenant, or enlarges an estate already in him; *(k)* *but where no estate passes [*180] there ought to be no rent, the rent being a retribution or return for something given, *(l)* *(2)* therefore if there were lord and tenant, and the tenant held of the lord by fealty and 10*s.* rent, and the lord released to the tenant or confirmed his estate, he yielding to the lord a hawk or rose yearly, this new reservation was held void, because there was no estate given to the tenant, for which he should make that new return of service to the lord; *(m)*

(d) *Ib.* overruling *Richmond and Butcher's case*, Cro. El. 217, and recognizing *Sury v. Brown*, Latch. 109.

(e) 1 Ventr. 162.

(f) *Jenison v. Lexington*, 1 P. Wms. 555.

(g) 8 Co. 71.

(h) 1 Inst. 214, a.

(i) *Bland v. Inman*, Cro. Car. 288; S. C., W. Jo. 398; 3 Roll. Abr. 450.

(j) *Ld. Rockingham v. Penrice*, 1 P. Wms. 177; S. C., 2 Salk. 578; recognising *Clun's case*, 10 Co. 127.

(k) 10 E. 4, 3; 21 H. 6, 8; 1 Inst. 141, a.; 2 Roll. Abr. 419; Gilb. on Rents, 26.

(l) *Ib.*

(m) Litt., s. 438; Dy. 230; Moor, 631.

(1) *Williamson v. Richardson*, 6 Monr. 605.

(2) Nor will it be created by an agreement to convey for a price to be paid in money or by rents to be reserved on conveyances of parcels of the land, even though the articles stipulate that the grantor until such settlement shall have all the remedies as are usual in ground-rent deeds; for to constitute such a rent, there must be a conveyance of the land, until that, it remains purchase-money. *Moroney v. Copland*, 5 Whart. 407.

but if there be tenant for life, and he in the reversion release to him in tail, reserving rent, the reservation is good, because the tenant's estate is enlarged by the release;(n) so, if the lord of a manor by indenture at common law releases to his copyholder in fee, to him and his heirs, or confirms such lands to his copyholder and his heirs, reserving a rent, this reservation is good, because the release or confirmation enures by way of *mitter le estate* to pass an estate at common law to him, when before he had but a copyhold estate;(o) and so, in other cases upon releases which enure by way of *mitter le estate*, as by one joint tenant to another, a rent may be reserved;(p) but upon a release or confirmation which enures by way of *mitter le droit* only no rent can be reserved, because such release operates by way of extinguishment.(p)

167. At common law no rent could have been reserved upon a bargain and sale, because only a use passed, which was not any estate to which the bargainor could have had recourse for a distress, but now by the Statute of Uses, the use and possession passing together, it amounts to a grant of the land itself,(q) and the reservation, as if out of the estate executed by the statute, will not be deemed a use upon a use;(r) so, on the same principle, it has been held that *a rent may be reserved upon a covenant to stand seised, as where, in consideration of natural love, a man covenanted to stand seised of certain lands to the use of himself for life, with remainder over, and to the intent that his son should have a rent during his father's life, it was held, that the son had a good rent upon such a covenant as upon a feoffment.(s) As to limiting a rent to uses, see ante, § 159.

168. It seems that the effect of reserving rent upon a lease or a gift in tail and upon a feoffment is not in all cases the same. If a man seised of land on the part of his mother makes a lease or a gift in tail, reserving rent to him and his heirs, this rent shall go with the reversion to the heirs on the part of the mother, because the nature of the contract is such that the retribution should go to those who lose the profit of the land during the gift or lease;(t) but if in like case he had made a feoffment in fee, reserving rent to him and his heirs, the rent in that case would go to the heir on the part of the father, because here is an entire disposition, and the rent is in the nature of a new purchase, coming into the family from the grant of the feoffee, and therefore the blood of the father shall be preferred.(t)(1)

169. There can be no rent reserved upon any conveyance that enures by

(n) 10 E. 4, 3; 1 Inst. 193; Gilb. on Rents, 27.

(o) Samme's case, 13 Co. 55.

(p) 1 Inst. 193.

(q) Weeks v. Tillard, Cro. El. 595; 1 Inst. 144, a. See also Puttenham's case, 1 And. 18.

(r) Cromwel's case, 2 Co. 72 b. See also Dy. 362; Chomley's case, 2 Co. 54; 2 Inst. 273; Vaugh. 52; Gilb. on Uses, Sugd. cd., 86, n. (3.)

(s) Revitt v. Godson, W. Jo. 179.

(t) 1 Inst. 12.

(1) And such a conveyance is a revocation of a will, and the rent reserved does not pass thereby, Skerrett v. Burd, 1 Whart. 246; and it is such an entire alienation of the land that on conveyance of wife's lands, reserving a rent to husband and wife and their heirs, the rent vests in the husband, surviving the wife, in fee. Robb v. Beaver, 8 W. & S. 107.

way of extinguishment,(u) because in such case there is no reversion left in him to create a tenure ; therefore if a lessee surrendered his estate, reserving rent, this reservation was held not to be good ;(x) but such a reservation may be good by way of contract, and an action of debt may be brought upon it.(y)(1)

So, where a rent is reserved upon a feoffment, and the feoffor has no reversion, yet this is a rent, and is *recoverable by the name of rent [*182] upon the contract.(z) And so, where an assignee has assigned over a term, rent may in that case be recoverable against the second assignee.(z)

So, an agreement for a lease at a rent certain is not a sufficient reservation of rent, so as to constitute a demise, and therefore if a party be let into possession under such an agreement, he cannot distrain, although he may have an action of debt,(a) see further, 1 Prec. in Conv. tit. Agreements.(2)

So, a rent could not be reserved on a fine *sur cognisance de droit come ceo* or any other fine which was executed ; *sed secus* where an estate for life only was conveyed by the fine.(b)

4. Upon what Things Rent may be reserved, or out of what it may issue.

170. It is laid down as a rule, that a rent cannot issue out of any inheritance but such as is said to be manurable, wherein an entry may be made and distress taken, as lands and tenements ; therefore a lease for the verdure or herbage of the land, reserving rent, is good, for the lessor may enter upon the land to distrain ;(c) but the grant of a rent-charge out of land, of which the grantor is not seised at the time of the grant, is void, although the grantor should afterwards purchase the same lands.(d)

171. As a consequence of this rule no rent can be reserved upon any incorporeal hereditament or thing lying in grant, because to such things recourse cannot be had for a distress ;(e) therefore no rent can properly be reserved for a common, as the common belongs to many, and it cannot be [*183] liable to distress by the act of one ;(f) yet by the *11 G. 2, c. 19, s. 8, (see Dig. P. iii. tit. Landlord and Tenant,) it is provided that a landlord or his steward may seize as a distress for rent cattle of his tenant feeding upon a common.

172. Upon the same principle there cannot at common law be a rent re-

(u) *Samme's case*, sup.

(x) 2 Roll. Abr. 491.

(y) *Winston v. Pinkney*, 2 Lev. 80 ; S. C., 1 Vent. 242 ; 2 Danv. 501 ; recognised in *Brownlow v. Hewley*, 1 Ld. Raym. 82. See also Cro. Jac. 487 ; Allen, 57 ; 4 Mod. 174 ; *Gilb. on Rents*, 29.

(z) *Newcomb v. Harvey*, Carth. 162.

(a) *Hegan v. Johnson*, 2 Taunt. 148 ; *Dunk v. Hunter*, 5 B. & A. 322.

(b) Bro. Abr. tit. Fines, p. 30 ; Roll. Abr. tit. Fine, O., p. 10.

(c) 1 Inst. 47, a.

(d) Perk., sect. 65.

(e) 1 Inst. 142, a.

(f) *Sanderson v. Harrison*, Cro. Jac. 679.

(1) *Ege v. Ege*, 5 W. 138.

(2) See *Watson v. O'Hern*, 6 W. 363, ante, 173, n. 1.

The distinction between an agreement for a future lease and a lease in possession, is recognized in *Hallet v. Wyley*, 3 Johns. 44. *Thornton v. Payne*, 5 Johns. 74. *Buell v. Coole*, 4 Conn. 238.

*Eng. C. L. Reps. vii. 115.

served upon tithes, because there is no place upon which a distress may be taken; (g) but an action of debt is given by the 5 G. 3, c. 17, to ecclesiastical persons for arrears of rent upon leases of tithes, &c.; so, where a rent-charge of £20 was devised out of a rectory, the glebe whereof amounted to 40*s. per annum* only, the whole rectory was in equity held liable to the rent; (h) so, where a lease was made of land and tithes, the rent was held to issue out of the land and not out of the tithes. (i)

So, neither can a rent issue out of a hundred, fair, office, and the like, for these were instituted for public purposes; (k) so, likewise not out of rent; (l) but a rent reserved on a lease made of an incorporeal thing, as of a fair, is good by way of contract between lessor and lessee. (m)

So, a rent must be reserved out of an estate that passes by a conveyance, and not out of a right; and therefore if disseise release to the disseissor of land, reserving a rent, the reservation is void. (n)

So, a rent cannot issue out of a term for years, therefore the lessee having assigned cannot distrain. (o) (1) but he must bring his action on the contract; (o) so, if a lease be made of an incorporeal hereditament, reserving rent, such reservation is good to bind the lessee by way of contract for the non-performance of which the lessor shall have his action of debt; (p) but *although a rent cannot issue out of chattels, yet it has been held, that distress may be made for the rent of furnished lodgings, for the [*184] rent issues out of the realty and not out of the goods. (q) (2)

173. Although reversions and remainders are incorporeal hereditaments, and can pass only by grant, yet a rent may be reserved upon a lease of them, because although the grantor has no remedy for them during the continuance of the particular estate, yet there will be a remedy by distress when they come into possession; (r) so, and for the same reason, it is, if the lord grants his seignory, reserving rent, for here is a prospect, though distant, of a remedy by distress upon the escheat of the tenancy; (s) so, on the same principle, if a man grants a future interest in land, he may reserve a rent immediately, for he may have his remedy by distress when the lessee comes into possession. (t)

174. The Crown is also in general excepted from the rule above mentioned, and the queen may reserve rent on incorporeal hereditaments, because

(g) *Valentine v. Denton*, Cro. Jac. 111.

(h) *Thorndike v. Allinton*, Chan. Ca. 79; *Gilb. on Rents*, 22.

(i) 2 Roll. Abr. 451. (k) Bro. Abr. tit. Rent, 11; *Butt's case*, 7 Co. 23 b.

(l) Bro. Abr. tit. Assize, pl. 2; *Keilw.* 161; 2 Roll. Abr. 446, pl. 7.

(m) *Jewell's case*, 5 Co. 3. (n) 50 E. 3, 9; 10 E. 4, 3 b; cited 1 Inst. 144, a.

(o) — *v. Cooper*, 2 Wils. 375. See also *Smith v. Mapleback*, 1 T. R. 446.

(p) *Dean of Windsor v. Glover*, 2 Saund. 302.

(q) *Newman v. Anderton*, 2 N. R. 226.

(r) *Capel's case*, 1 Co. 62 b; 1 Inst. 47, a; *Gilb. on Rents*, 24.

(s) 2 Roll. Abr. 446. See also *Perk.* 627; *Cro. El.* 546.

(t) *Plowd.* 423; *Falstaff's case*, 2 Roll. Rep. 467.

(1) *Ege v. Ege*, 5 Wend. 134.

(2) And when the demise is of land with a slave, it will be apportionable for defect of title to the latter. *Newton v. Wilson*, 3 H. & Mun. 470. *Mickie v. Wood*, 5 Rand. 574.

she may distrain in all the lands of her lessee for the rent;(*u*) but if the queen's tenant makes a lease of lands not holden of her, either for years or at will, she cannot distrain such lands in the hands of an under-lessee;(*x*) so, if lands are extended on an *elegit*, or are under sequestration, they are exempt from distress; but in this last case, upon application to a court of equity, liberty will be given to distrain without incurring a contempt of court.(*x*)

[*185] *5. *Reservation upon Leases made under Powers.*

175. Questions relating to this subject have arisen either on the amount of rent or the mode of reservation. Sometimes a power is given of leasing on lives and upon the payment of fines, as the lives drop, which are considered among the annual profits;(*y*) but the more usual provision, in settlements, is to require the best rent to be reserved, without taking any fine or foregift; and whether the best rent has been reserved is commonly left to the decision of the jury;(*z*) and although the best rent reserved be the full value, yet if satisfactory evidence can be produced to a jury, that a tenant was willing to give additional rent in lieu of money, agreed to be laid out in improvements, it has been held that the lease could not be supported,(*a*) when, from the quantity and nature of the property demised, it is not possible to ascertain whether the rent reserved is the best rent, the lease will be deemed invalid.(*b*)

176. If a fine be taken contrary to the terms of the power, the lease cannot be supported;(*c*) and any thing in the form of a premium has been held to come within the prohibitory clause.(*d*)

Formerly a rent under leasing powers was reserved by the words "the ancient or usual rent," and the better opinion is, that by these words is to be understood the rent reserved at the time of the creation of the power, [*186] where a lease was then in being, or reserved in the lease *immediately preceding that time,(*e*) and where gold has been usually reserved, silver cannot be made payable in lieu of it;(*g*) so, if commonly paid at four days, a reservation at one or two days is bad.(*h*) but a mere difference of words is not material, and therefore a reservation of eight bushels of wheat, in lieu of a quarter of wheat is good, because it is all one in quantity, value and nature.(*h*)

(*u*) 1 Inst. 47, a; 5 Co. 5, 56; Lane, 39; Gilb. on Rents, 22.

(*x*) Attorney-General v. Coventry (Mayor), 1 P. Wms. 306.

(*y*) 1 Burr. 121.

(*z*) Doe v. Lloyd, 3 Esp. 78; Roe v. York (Archb.) 6 East, 84; Sugd. Pow. 413, 6th ed.

(*a*) Wright v. Smith, 5 Esp. 203. See also Campbell v. Leach, Ambl. 740; Doe v. Bettison, 12 East, 305; Shannon v. Bradstreet, 1 Sch. & Lef. 52.

(*b*) Cardigan (Earl) v. Montague, Sugd. Pow. App. N. 14 (2).

(*c*) Cox v. Day, 13 East, 122; O'Brien v. Grierson, 2 Ball. & Beat. 323. See also Campbell v. Leach, Doe v. Bettison and Shannon v. Bradstreet, sup.

(*d*) Doe v. Rogers, 5 B. & Ad. 765; 2 S. C., 2 Nev. & Man. 550.

(*e*) Morrice v. Antrobus, Hard. 325; Orby v. Mohun, 3 Chan. Rep. 56 et seq.; S. C., 2 Vern. 531; Prec. Chan. 257; 2 Freem. 29; Right v. Thomas, 3 Burr. 1441; S. C., 1 Bl. 416; Doe v. Creed, 4 M. & S. 371.

(*g*) Mountjoy's case, 5 Co. 4 b.

(*h*) Id. 5 b.

177. Regularly the rent to be paid should be specified in the lease, but if there be words in the reservation by which the rent can be ascertained, it will be sufficient;(*i*) but when the reservation is vague and indefinite the lease will be void.(*k*)

Where the rent is required to be reserved at particular days, the reservation must be accordingly, but where merely the best yearly rent is required, it may be made payable quarterly or otherwise,(*l*) but the rent cannot be reserved either after or before the day appointed.(*m*)

Where one entire gross sum is reserved on the demise of lands, part of which are not within the power, the demise is void;(*n*) as where opened and unopened mines were demised by one deed, containing a general reservation, and the power did not authorise a demise of unopened mines, it was held that the whole was void(*o*) unless where the rent is reserved according to the quantity or produce,(*o*) or there is a distinct reservation of a particular sum in respect of the lands comprised in the power.(*p*)

*A reservation to the tenant for life exercising the power, "his heirs and assigns," is a good reservation, for those words mean of [*187] necessity the person to whom the inheritance shall go,(*q*) see further, ante, §§ 160—165.

III. What Estates may be had in a Rent.

§ 178. Fee-Simple.

179. Fee-Tail.

180. For Life.

Occupancy.

181. Rent executed to Uses.

182. Curtesy in a Rent.

183. Dower in a Rent.

184. Rent to commence in Futuro.

§ 185. Rent in Remainder.

186. Seisin of Rent.

Seisin in Law.

187. Under the Statute of Uses.
Seisin of a Rent-Charge.

188. No Disseisin of a Rent.

189. Transfer of a Rent.

178. Rent is susceptible of the same limitations as land, and may therefore be granted in fee, in tail or for life.(*r*) When a rent was granted in fee, with a clause of distress, and a fine was levied to the intent, that if the rent were behind, the grantee might enter, it was held that this created a contingent and future interest, which was a matter of inheritance, and being a security for the payment of the rent, might well be transferred therewith, for by the grant of the rent the penalty and the advantage passed.(*s*)(1)

(*i*) *Lewison v. Pigot*, cited 3 Chan. Rep. 6; and see *Audley v. Audley*, 2 Chan. Rep. 82; *Shannon v. Bradstreet*, sup.

(*k*) *Orby v. Mohun*, sup.

(*l*) *Dean and Chapter of Worcester's case*, 6 Co. 37 b; *Campbell v. Leach*, Amb. 740.

(*m*) *Ludlow v. Beckwith*, All. 90; *Doe v. Gifford*, 5 B. & A. 371; *Sugd. Pow.* 427, 6th ed.

(*n*) *Doe v. Lloyd*, 3 Esp. 78.

(*o*) *Campbell v. Leach*, sup.

(*p*) *Knight's case*, 5 Co. 54 b. See also *Hov v. Whitfield*, 1 Vent. 339, S. C., 2 Show. 67; *Cardigan (Earl) v. Montague*, sup.; *Orby v. Mohun*, sup.; *Doe v. Meyler*, 2 M. & S. 276; *Doe v. Rendle*, 3 M. & S. 99.

(*q*) *Whitlock's case*, 8 Co. 69 b; *Hotley v. Scot*, Lofft, 316.

(*r*) *Butt's case*, 7 Co. 23.

(*s*) *Havergill v. Hare*, Cro. Jac. 510.

(1) *Farley v. Craig*, 6 Halst. 262. *People v. Haskins*, 7 Wend. 463. *Scott v. Lunt*, 7 Pet. 596.

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179. There may be a limitation in tail of a rent, as of land, but with this difference, that the tenant in tail of lands, with the immediate reversion in fee in the donor, might by a common recovery have barred the entail and the reversion (as he may now under the 3 & 4 W. c. 74, see Dig. p. ii. tit. Fines and Recoveries,) but the grantee in tail of a rent *de novo*, without a [*188] subsequent limitation *of it in fee, acquired by a common recovery a base fee only.(t)

180. So a rent may be granted to one for his own life or the life of another;(u) but if granted to A. for the life of another, remainder to B., although A. dies, yet the remainder is good.(u) But a rent for life granted out of a term for years is but a chattel, and shall be satisfied out of the term until one or other estate determines,(x) but when a rent is granted out of land in fee, and out of a term for years for the life of the grantee, this, as an estate of freehold, cannot issue out of the term, but out of the land which the grantor has in fee-simple.(y)

By the common law there could be no general occupant of a rent, therefore if a rent were granted to A., his executors and administrators during the life of B., and A. died intestate before *cestui que vie*, it was held, that the rent must determine, for his administrator could not claim it either as assign or occupant;(z) *sed secus* where there is a special occupant;(a) and it has been thought that executors and administrators, if named in the grant, might have taken an estate *pur autre vie*, though a freehold, even before the 29 C. 2, c. 3, and 14 G. 2, c. 20,(1) see Dy. 338; also further, Dig. p. i. tit. Estates, also post, tit. ESTATES.

181. Rents may be limited to uses under the Statute of Uses, being therein expressly mentioned, and that either as regards rents in *esse*, which may be executed in the same manner as uses of corporeal hereditaments, or rents *de novo* which are limited in use out of the seisin of the land, therefore when lands are conveyed to A. and his heirs, to the intent that B. or B. and his [*189] heirs may receive a rent, the rent *is executed in B.:(2) but as in the case of lands, the Statute transfers the legal estate in the rent to the first *cestui que use*, when therefore lands are conveyed to A. and his heirs to the use of B., with a declaration that B. and his heirs shall stand seised of the rent to the use of C. for life, with remainder over, it was held that the use was executed first in B. and then in C., and that the remainderman took a trust estate only.(b)

182. There may be curtesy in a rent, and a man may be tenant by the curtesy of a rent although his wife die before the rent becomes due and she

(t) Chaplin v. Chaplin, 3 P. Wms. 229; Weeks v. Peach, Lutw. 1224.

(u) Salter v. Butler, Cro. El. 901; S. C. Yelv. 9.

(x) St. Auby's case, Cro. El. 183.

(y) Butt's case, 7 Co. 23.

(z) Salter v. Butler, sup.

(a) Plowd. 28, 556; Palm. 32.

(b) Chaplin v. Chaplin, sup.

(1) All tenements *per autre vie* pass to the executor, in Pennsylvania, under the act of 1834 s. 9, unless a special occupant be named.

(2) So of a rent reserved under a power to convey in fee on ground rent. *Ex parte Elliott*, 5 Whart. 524.

has but a seisin in law, because as Lord Coke says, the husband could by no industry attain to any other seisin, and *impotentia excusat legem*; (c)(1) so, where a rent-charge was granted to a woman and her heirs, payable at two feasts in the year, the first payment to be made at such of the said feasts as should happen after the death of J. S.; the woman married, had issue and died; it seems to have been the inclination of the court, that the husband should be tenant by the curtesy of the rent, for although the rent was to commence *in futuro* yet it was granted over presently, which proved to be in *esse*, so that the wife might be said *habere hæreditatem*, and the seisin was not material in the case of a rent. (d) So it is said that if a woman make a gift in tail, reserving a rent to her and her heirs, then takes husband and has issue, and the donee dies without issue, the husband shall not be tenant by the curtesy of the rent, for that it was determined by the act of God, and no estate thereof remained; but if a man seised in fee of a rent, makes a gift in tail general to a woman, who takes husband and has issue, the husband shall be tenant by the curtesy of the rent; because the rent remains; (e) so, if he be a tenant *de novo* granted in tail, and the wife dies without issue, the husband shall be tenant by the curtesy. (f)

*183. A woman shall have dower of a rent, whether it be rent-service, rent-charge or rent-seck, but it must be an estate in fee- [*190] simple; (g) for if it be an annuity which charges only the person, and does not issue out of any lands or tenements, she shall not be endowed; (g) so, if a man under the old law of dower made a lease for life of certain lands reserving a rent to him and his heirs, and then took a wife she should not be endowed of the reversion because there was no seisin either in deed or in law, nor of the rent because the husband had but a particular estate therein; *sed secus* if the husband had made a lease for years. (h)

So, for the same reason if the freehold of the rent were suspended during the coverture a woman should not be endowed. (i)

So, if a rent *de novo* were granted in tail without any remainder over, and tenant in tail took wife and died without issue, held that the wife should not be endowed because the thing out of which the dower was to arise was not in being; but it was otherwise where tenant in tail married and died without issue, whereby the estate tail was determined: for the wife in that case should be endowed notwithstanding, because the land was in being, though the estate tail was determined, and the dower was in some respects a continuance of the estate tail, (k) and see further as to dower, post, tit. DOWER.

So, in the same case, if a rent in *esse* were granted to A. in tail, remainder to B. in fee, and A. married and died without issue, it was held that the wife should be endowed: and so, if a rent *de novo* was granted to A. in tail, remainder to B. in fee, and A. married and died without issue, yet his wife should be endowed. (k)

(c) 1 Inst. 29, a.

(e) 1 Inst. 30, a.

(g) 1 Inst. 32.

(i) Lillington's case, 7 Co. 38.

(d) Dethick v. Bradburne, 2 Sid. 110. 117.

(f) Harg. Co. Litt. 30, a. n. (2.)

(h) Fulgeam's case, Noy, 280.

(k) Chaplin v. Chaplin, sup.

So, likewise in the same case it was held that a wife was not dowable out of an equitable estate;(*k*) but it is otherwise now under the new law, see post, tit. DOWER.

[*191] *184. A new rent may be made to commence *in futuro*, for being an incorporeal hereditament, there is no suspension of any freehold as in the case of land,(*l*) so that the period of commencement be not too distant ;(*m*) it is otherwise however with rent in *esse* or a rent already created, for that cannot be granted to commence after the death of another, because to such a rent there may be a precedent title.(*n*)

185. A rent-charge may be granted in remainder after a limitation of it to a person for life, as where granted to A. for the life of B. remainder over, it was held, that though A. should die in the life of B., so that the rent determined as to the perception of it, yet, inasmuch as the terre-tenant during that time held the land discharged of the rent, that was sufficient to support the remainder,(*o*) and although it has been objected that there could be no remainder of that whereof there was no reversion, yet the intent of the party gives the rent *de novo*, first a being for the whole, and then the lesser estates are carved out of it.(*p*)

186. A rent being an incorporeal thing, can be acquired only by actual receipt, but payment of any money in the name of seisin of rent, will give seisin,(*q*) and therefore where a man grants over divers and several rents, and the tenant gives a penny in the name of seisin of all rents, it is a good seisin ;(*r*) and payment of parcel of rent beforehand is an actual seisin of the rent to give a real action ;(*s*) and so it is if a man give an ox or a horse, or other valuable thing in the name of rent.(*s*)

[*192] 187. In some cases however there may be a seisin in law *of rent, as for instance to entitle a man to curtesy. (See ante, § 182.) So, there is a distinction between a rent at common law, and where it is limited under the Statute of Uses, as where land is conveyed to A. and his heirs to the use of B. that he may receive thereout an annual rent, there the use of the rent is immediately executed by the statute in B.(*t*)

As to a rent-charge the grant and delivery of the deed is no seisin of the rent, for the seisin in law, which the grantee has by the grant, is not sufficient to maintain an action.(*u*)

188. Where a person has been once seised of a rent, he cannot afterwards be disseised of it except at his own election ;(*x*) for if A. is seised of a rent-charge, and the tenant of the land pays the rent to another, this will not

(*k*) Chaplin v. Chaplin, sup.

(*l*) Plowd. 156; Palm. 29, 30; 2 Vent. 204.

(*m*) Gilb. on Rents, 60; and see Turner v. Turner, 1 B. C. C. 316.

(*n*) Plowd. 156.

(*o*) Salter v. Butler, Yelv. 9.

(*p*) Weeks v. Peach, 2 Salk. 277.

(*q*) 1 Inst. 159, b.; 160, a.

(*r*) 22 Ass. 66; Bevil's case, 4 Co. 8, 9.

(*s*) 1 Inst. 315, a.

(*t*) Chaplin v. Chaplin, 3 P. Wms. 229.

(*u*) 1 Inst. 160, a.

(*x*) Litt. ss. 237, 240.

divest A. of his right; and the payment of the tenant being in his own wrong, the rent still remains in arrear to A.(y)(1)

189. A rent in *esse* may be granted or assigned even before the grantor has seisin of it,(z) but not during its suspension;(a) and a rent-charge might be conveyed by fine and recovery,(b) now by the substituted assurance under the 3 & 4 W. 4. c. 74, see Dig. P. i. ii. tit. Fines and Recoveries. So, it might before the 4 & 5 Vict. c. 21, have been conveyed by lease and release, and now by release only; so also by bargain and sale, and covenant to stand seized;(c) as well as by grant at common law.

***IV. Payment of Rent.**

[*193]

1. Days of Payment of Rent.

§ 191. By Appointment of the Parties.
Or of the Law.
192. General Reservation.

§ 193. Days of payment, how limited.
Particular days of payment.
Payment in advance.
Old and New Lady Day, &c

2. When Rent is due.

194. Part of the day.
The Day itself.

194. How Parties are affected by the law.

3. Where Rent is payable.

195. On the Land.

195. In the Exchequer.

4. How Rent is payable.

196. Payment before it is due.
196. Set-off against Rent.

196. Arrears of Rent a Specialty Debt.

5. To whom Rent is payable.

197. Real or Personal Representatives.
198. As between Landlord and Tenant.
In case of Bankruptcy.
199. Execution against Tenant.

200. Landlord's Claim under what Executions.
201. As between Morgagor and Mortgagee.

6. Liability to pay Rent.

202. Liability under Covenant.
203. Relief in Equity.
204. In case of Eviction.
From Part of the Land.
Eviction in case of Tenancy from
Year to Year.

205. Liability of Tenant in case of Assignment.
206. Where there is no beneficial Enjoyment.
207. Liability of Personal Representatives.

(y) Litt. sect. 558, 559; see also 10 Co. 97; Hawk. P. C. c. 64, s. 45; 3 Cr. Dig. 295.
(z) Perk. sect. 91; Shep. Touchst. 238. (a) Shep. Touchst. sup.
(b) Fig. 97. (d) Lade v. Baker, 2 Vent. 260.

(1) And lapse of time, during which, it is not paid, produces no effect upon it, where there is a deed to show its origin. St. Mary's Church v. Miles, 1 Whart. 229.

§ 190. Under this head may be considered—1. Days of payment of rent; 2. When rent is due; 3. Where rent is payable; 4. How rent is payable; 5. To whom rent is payable; 6. Liability of tenant to pay rent.

1. Days of Payment of Rent.

191. The days of payment are either by the particular appointment of the parties, or in default thereof by the *appointment of law so as [*194] to answer the intention of the parties;(d) and, therefore, if A. makes a lease to B. the 6th of August, rendering yearly the rent of forty shillings at the two feasts of the year, that is, at Lady-day and Michaelmas, by equal portions; though in this case by the appointment of the parties Lady-day be the first term mentioned, yet the first payment shall be made at Michaelmas ensuing the date of the lease; for without such transposition, the intention of the parties would never be fulfilled; because the rent being reserved annually, the lessor would lose the profits of one-half year, as the lessee would enjoy the land from the date of the lease to the first Michaelmas without paying rent, and so likewise from the last Lady-day of the term to the expiration of it; because, although the lease ended in August, yet the payment was not to be made till Michaelmas, before which the lease expired.(e) See also 5 Co. 112; 3 Bulst. 328; 2 Roll. Rep. 213; T. Jo. 109, as to how the law marshals payments.

So, if a man make a lease the first day of May, reserving rent quarterly, this shall be intended quarterly from the making of the lease; for if the beginning of the quarter be construed to be any other day than the date of the lease, the lessor will lose a portion of the profits.(f)

192. A rent reserved generally is payable at the end of the year;(g) and although there was a parol agreement to pay quarterly, and the rent was accordingly paid quarterly, yet, as there was no mention in the written agreement of the time when the rent was to be paid, it was held, that the rent was still payable yearly, and not quarterly;(h) and if the rent is made payable yearly during the time that the lessee shall enjoy the land, the lessor cannot demand this rent half-yearly, but must wait to the end of the year.(i) [*195] *So, if a man grants a rent of 10*l.* to another, payable at the two usual feasts of the year, this shall be intended by equal portions, though it be not so mentioned in the deed, because where there are two several days appointed for the payment, it is the most equal construction that a moiety of the rent shall be paid at each day;(k) and the two usual feasts shall be deemed to be Lady-day and Michaelmas, because they are the days usually appointed in contracts of this nature.(l)

193. When special days of payment are limited by the *reddendum*, the rent must be computed according to the *reddendum*, and not according to the *habendum*; and the computation of the rent according to the *habendum* is only when the *reddendum* is general, that is, yielding and paying quarterly so much rent.(m)

(d) Plowd. 171; 1 Inst. 217; Hob. 172; Gilb. on Rents, 48.

(e) Hill v. Grange, Plowd. 171. (f) 2 Roll. Abr. 449, 450. (g) Latch, 264.

(h) Turner v. Allday, Tyr. & Gr. 819.

(i) Hctt. 53; Litt. Rep. 61.

(k) Noy, 18; 2 Roll. Abr. 450.

(l) 2 And. 122; 2 Roll. Abr. 450.

(m) Tomkyns v. Pinsent, 2 Ld. Raym. 819; S. C., 1 Salk. 141; 7 Mod. 96.

Where rent is reserved quarterly or half-quarterly, if required, and the landlord received the rent quarterly for the first twelve months, it was held, that he could not without notice distrain for a half-quarter's rent; ⁽ⁿ⁾ and if rent is intended to be made payable in advance, it must be so clearly specified; for where a house was let at a yearly rent, payment to commence at Michaelmas, and to be paid three months in advance, such advance to be paid on taking possession, held that this advance was confined to the first quarter only; and if the intention had been otherwise, it ought to have been said "always paid in advance"; ^(o) but under a *reddendum* of a yearly rent, payable by four equal quarterly payments, commencing from the 25th day of *March* then instant; the first quarter's rent is payable on the said 25th day of *March*; and consequently the rent is a beforehand rent; ^(p) and yet under an agreement for the quarterly *payment of rent, the first payment becomes due at the end of the first quarter, and [^{*196}] the custom of the country to pay rent in advance cannot be imported into it. ^(q)

Where on a parol demise rent was to be payable from the *Lady-day* following, evidence of the custom of the country was held admissible, to shew that the parties meant "Old Lady-day;" ^(r) so, where the defendant in replevin avowed that the rent was payable at Martinmas, to wit, Nov. 23rd, this was held to mean *New Martinmas*, but evidence was admitted to shew that the rent was payable at Old Martinmas. ^(s)

2. When Rent is due.

194. The time when rent is due by law respects either the part of the day, or the day itself.

As to the part of the day, it seems to be settled that rent is not due until midnight of the day upon which it is reserved; ^(t) although sunset is the time appointed by law to make a proper demand of it, in order to take advantage of a condition of re-entry, and to tender rent in order to save a forfeiture. ^(u)

As to the day itself, it has been held, that where the reservation is in the alternative, to pay at any particular feast, or so many days after, although it is in the election of the lessee to pay at the feast, yet the rent was not legally due until the last of the days after; ^(v) and where the reservation was until a certain feast, the feast-day was held to be inclusive; ^(x) and though there be election to pay on the *said feast or twenty-one days after, yet this was held not to be material, for when the last feast comes, it is [^{*197}] absolutely due on that day. ^(x)

⁽ⁿ⁾ *Mallam v. Arden*, 10 Bing. 299; 3 S. C., 3 Mo. & Sc. 763.

^(o) *Holland v. Palser*, 2 Stark. 161.^b

^(p) *Hopkins v. Helmore*, 8 Ad. & E. 463; 3 S. C., 3 Nev. & P. 453; 1 W. W. & H. 386; 2 Jur. 856.

^(q) *Doc v. Weller*, 1 Jur. 622.

^(r) *Doc v. Benson*, 4 B. & A. 588; recognised in *Den v. Hopkinson*, 3 D. & R. 507.^c

^(s) *Smith v. Walton*, 8 Bing. 235; 1 S. C. 1 M. & Sc. 380.

^(t) *Clun's case*, 10 Co. 127; *Duppa v. Mayo*, 1 Saund. 287; 3 S. C., 2 Salk. 578. See also *Southern v. Bellasis*, cited *Rockingham v. Penrice*, 1 P. Wms. 177; *Stratford (Earl) v. Lady Wentworth*, Id. 180.

^(v) *Clun's case*, sup.

^(u) *Duppa v. Mayo*, sup.

^(x) *Biggon v. Bridge*, 3 Keb. 531, overruling *Umble v. Fisher*, Cro. El. 702; 3 S. C., Yelv. 74; and recognising *Anon.*, 3 Leon. 211.

^a 25 Eng. Com. Law Reps. 140. ^b 3 Id. 294. ^c 35 Id. 439. ^d 6 Id. 527.

^e 16 Id. 177. ^f 21 Id. 286.

The question as to the time when rent is due, affects not only the party liable to pay, but also the party entitled to receive. Rent is not due before the day of payment incurred, (1) and if paid by the tenant before it is due, it is a voluntary payment; (2) and if the lessor dies on the day when it ought to be paid, but before midnight, the rent which is incident to the reversion will go with the land to the heir or reversioner; but this is to be understood of the case of a lease made by a person seised in fee, or made under a power; for it is otherwise in the case of a lease made by a tenant for life.

Where the rent is once due, or in arrear, it goes to the executor as a chattel, although before it is due he cannot recover it; (a) and where a testator died in the afternoon of Michaelmas-day, after having received rent from one of his tenants on the morning of that day, the executor was compelled to account for it to the party entitled. (b) As to what goes to the heir, and what to the executor, see further, ante, § 12.

3. *Where Rent is payable.*

195. Where rent is reserved payable yearly, it is to be paid on the land, for the land is the debtor; (c) (2) and it makes no difference that a man has bound himself to perform the covenants of his lease, for the rent may be tendered on the land without seeking the obligee. (c) The lessee of the queen must pay his rent, without demand, at the Exchequer, wherever it [*198] may be; but if the queen grant the land in *reversion, the patentee must demand the rent on the land before he can enter as for a forfeiture for non-payment. (e)

4. *How Rent is payable.*

196. If the tenant pay his rent before the day, it is voluntary, and no satisfaction at law; but if it be paid in the name of seisin of rent, it will enure to give seisin; (f) but such payment in equity will it seems discharge the lessee; (g) but the remainderman may in that case recover it from the personal representatives. (g) If rent is payable at the feast of Easter, and the tenant pays the rent in the morning, and the lessor dies at two hours before noon of the same day, this payment although voluntary is a good satisfaction against the heir, but not against the queen; (h) and the same has been decreed in equity. (i)

Rent in arrear, whether by deed or parol, is held to be of equal degree with a specialty debt, and therefore in the distribution of a deceased tenant's

(z) See post, § 197.

(a) *Pilkington v. Dalton*, Cro. El. 575.

(b) *Lord Rockingham v. Penrice*, sup.

(c) 1 Inst. 201, b.

(e) *Borough v. Taylor*, Cro. El. 462.

(f) *Clun's case*, sup.; *Cromwell (Lord) v. Andrews*, Cro. El. 150.

(g) *Rockingham (Lord) v. Oxenden*, cited in ex parte *Smyth*, 1 Swanst. 346, n.

(h) 44 E. 3, 3 b, cited in *Clun's case*, sup.; and see *Yelv.* 167; *Brownl.* 106; *Hard.* 24.

(i) *Lord Rockingham v. Penrice*, sup.

(1) *Wood v. Partridge*, 11 Mass. 493. *Bank v. Wise*, 3 Watts, 401. And an eviction on the day on which payable, extinguishes it. *Smith v. Shepherd*, 15 Pick. 147.

(2) Whether in money or kind; and a plea of readiness and tender there sufficient. *Walter v. Dewey*, 16 Johns. 222.

estate, is to be paid with debts of that degree. *(k)* Rent, like any other species of debt, may be paid by a remittance by the post, and if so directed by the landlord and it be lost, the latter must bear the loss; *(l)* and so a landlord or any other creditor may insist upon payment being made to himself; but having once authorized payment to an agent, he cannot revoke the authority, if the debtor has given such a pledge to pay as would bind him in a court of law; *(m)* and in the 3 and 4 W. 4, c. 42, debt for rent upon an indenture of demise is *put on the same footing as other specialties, [*199] see Dig. iii. tit. Limitations of Actions.

If a landlord take a security, as a bill of exchange and the like, this will not amount to a payment, nor bar him of his remedies. *(n)* (1)

As a rule no payments made or damages sustained by a tenant can be set off against a claim for rent, except a payment for ground-rent; *(o)* or for the land-tax under the 38 G. 3, c. 5, s. 17, which requires such deductions to be allowed; *(p)* or the property-tax; *(q)* or other rates regularly assessed on the landlord; *(r)* or where a tenant is compelled to make any payment which the landlord is bound to make, in order to save himself from being ousted; *(s)* or where the tenant is compelled to make repairs, which the landlord is bound to make; *(t)* or where there is a special agreement, that the tenant may deduct from the rent moneys due from the landlord. *(x)* (2)

5. To whom Rent is payable, or who entitled to receive Rent.

197. As to the persons entitled to receive rent, questions have arisen be-

(k) Willott v. Earle, 1 Vern. 490; Gage v. Acton, 1 Freem. 512; S. C., Com. 67; Carth. 511; 1 Salk. 325; Thompson v. Thompson, 9 Price, 471.

(l) Warwicke v. Noakes, 1 Peake, 67.

(m) Hodgson v. Anderson, 3 B. & C. 842; S. C., 5 D. & R. 735.

(n) Harris v. Shipway, Bull. N. P. 182; Ewer v. Clifton, Id.; and see Swin v. Milhil, 1 Ken. 370; Davis v. Gyde, 3 Ad. & Ell. 623; S. C., 4 Nev. & Man. 462; 1 Harr. & Woll. 50; Palfrey v. Baker, 3 Price, 572.

(o) Doe v. Hare, 2 Cr. & Mess. 145; S. C., 4 Tyrwh. 29.

(p) Saunderson v. Hanson, 3 C. & P. 314; Carter v. Carter, 5 Bing. 406; S. C., 2 M. & P. 732.

(q) Clennell v. Read, 7 Taunt. 50; S. C., 2 Marsh. 371.

(r) Roper v. Bumford, 3 Taunt. 76.

(s) Smith v. Pearce, Woodf. L. & T. 291, 4th ed. by Harr. & Woll.

(t) Waters v. Weigall, 2 Inst. 575.

(x) Willson v. Davenport, 5 C. & P. 531.

(1) Nor a promissory note, Snyder v. Kunkleman, 3 Penna. Rep. 487, nor a judgment on the covenant, Chipman v. Martin, 13 Johns. 240; Baneleon v. Smith, 2 Binn. 153; or in debt and security given, Shetsline v. Keemle, 1 Ash. 29; Gordon v. Correy, 5 Binney, 552.

(2) In Pennsylvania, where the right of set-off is much more extended than elsewhere, including damages for breach of distinct contracts, the right is confined in replevin for distress, to damages for the covenants in the lease which constituted part of the consideration of the rent. Peterson v. Haight, 3 Whart. 150-3, and cases cited; Warner v. Clark, id. 193; Gray v. Wilson, 4 Watts, 39. But in New York, an omission to repair or finish, cannot be set off, though it is not said whether the lease contained a covenant to that effect, Allen v. Pell, 4 Wend. 505. Etheridge v. Osborn, 12 Wend. 529, was a covenant by the landlord to construct a race-way, a non-compliance with which could only be remedied by a separate action. There certainly seems to be good sense in the view taken in Fairman v. Fluck, 5 W. 517, that covenants for rents are like other covenants, and where the plaintiff has not complied with his precedent condition, he cannot compel payment of its consideration.

*10 Eng. Com. Law. Rep. 247. *14 Id. 324. *15 Id. 479. *2 Id. 50. *24 Id. 442.

tween the real and personal representatives of the deceased lessor, between the landlord and tenant, or the mortgagor and mortgagee.

As between the real and personal representatives the rent will on the death of the lessor go to the one or the other, either according as the rent is reserved or as the death happens before or after the rent becomes due ;(*y*) [**200*] but this must be understood as applying only to the case of a lease made *by a lessor seised in fee, or made by one under a power; in the case of a lease by a tenant it is different. In two particular cases, indeed, it has been held that the executor of a tenant for life was entitled to the rent although the lessor died before it was due; as where A. granted a rent-charge to B., payable at Lady-day and Michaelmas, and B. died on Michaelmas-day after sunset, it was held, that as B. lived till after sunset, which was the legal time for demanding the rent, though he died before twelve at night, it should go to the executor ;(*z*) and so, where A., tenant for life, remainder to his wife for life, made a lease reserving rent at Lady-day and Michaelmas, and died on Michaelmas-day about twelve o'clock at noon, his administrator was held to be entitled to this rent ;(*a*) for the Court took a difference betwixt a rent incident to a reversion, which must go somewhere (if not to the executor, then to the heir), and where the rent can go nowhere, unless to the executor; in which latter case if the lessor lived to the beginning of the day, at which time a voluntary payment might be made, this would be sufficient to entitle the executor or administrator to the rent, rather than it should be lost ;(*b*) but in other cases where the lessor, tenant for life, died before the time reserved for the payment of the rent by the lessee, the rent which accrued from the last quarter to the time of the death was lost, or, in other words, retained by the lessee himself ;(*c*) but by the 11 G. 2, c. 9, s. 15, amended and extended by 4 & 5 W. 4, c. 22, this portion of the rent is given to the executor or administrator. See post, § 210; also Dig. P. ii. tit. Apportionment.

198. A payment of rent by mistake or misrepresentation to a person not entitled to it, does not preclude the tenant from shewing, that the person, to whom it was paid, was not *entitled ;(*d*) and the party paying under [**201*] such a misapprehension may recover the amount so wrongfully paid ;(*e*)(1) and where a landlord received through his agent his rent regularly from a tenant, without deducting the sewers' rate, which it was afterwards

(*y*) See ante, § 195.

(*z*) *Bellasis v. Cole* (sometimes cited as *Southern v. Bellasis*), cited in *Rockingham (Lord) v. Penrice*, 1 P. Wms. 178; 1 Saund. by Wms. 288, n. (17).

(*a*) 10 Co. 127, b.

(*b*) 10 Co. 127, b. See also *Strafford (Earl) v. Lady Wentworth*, Prec. Chan. 555, cited 1 P. Wms. 180.

(*c*) *Jenner v. Morgan*, 1 P. Wms. 392.

(*d*) *Rogers v. Pitcher*, 6 Taunt. 202; 1 S. C., 1 Marsh. 541.

(*e*) *Williams v. Bartholomew*, 1 B. & P. 326.

(1) The same principle is found in effect in a dictum in *Boyer v. Smith*, 5 W. 66, and was decided in *Gleim v. Rice*, 6 W. 44; *Robbins v. Kitchen*, 8 W. 390. A tenant is estopped denying his landlord's title or setting up title in any other; but fraud in obtaining acceptance of a lease by a tenant, or after having conveyed in trust for creditors, are exceptions to this rule.

found that by the terms of the agreement the tenant ought to have paid, he could not recover the sums so deducted as arrears of rent.(f) If a landlord grants a lease, reserving rent, and no rent is paid, this is held to be adverse possession, in the same manner as if rent had been paid to the wrong person.(g)

One of several joint tenants may demand and receive the whole rent due and give a discharge for it, and such a discharge is binding on his companions;(h) so, upon a lease by tenants in common, the survivor may sue for the whole; although the reservation be to the lessors according to their respective interests.(i)

Where money is paid by a tenant after an act of bankruptcy by a landlord who is about to distrain, such payment will be good, and cannot be impeached by the assignees.(k)(1) As to the effect of the wrongful payment of rent in respect of the Statute of Limitations, see Dig. P. iii. tit. Limitations.

199. By the 8 A. c. 14, when the goods of a tenant are taken in execution the landlord may claim to be paid a year's rent; but in that case there must be an existing tenancy at the time; therefore, where growing crops of a tenant were seized under a *fi. fa.* and a writ of *habere facias possessionem* was subsequently delivered to the sheriff in an ejectment at the suit of the landlord, it was held that the growing crops *could not be legally considered as belonging to the tenant, he being a trespasser [*202] from the day of the demise laid in the declaration, and that the sheriff was not bound to allow a year's rent under the statute, which contemplates an existing tenancy only at the time of the execution;(l) and the demand must be made while the goods are in the hands of the sheriff; and, therefore, could not be made by an administrator, to whom administration was granted after the goods were sold under an execution;(m) and the landlord cannot claim from the sheriff rent accruing due subsequently to the levy and sale under a *fi. fa.*, although the goods were not removed from the premises;(n) but where a person held under an assignment of a lease which by the terms of the agreement was not completed at the time of the *fi. fa.* levied on the goods of the assignee, the sheriff nevertheless was held bound to pay the lessee half a year's rent due at the time of the levy;(o) and a sheriff ought to have evidence that the rent is due.(p)

(f) Waller v. Andrews, 3 M. & W. 312; H. & H. 87.

(g) Doe v. Oxenden, 7 M. & W. 131.

(h) Robinson v. Hoffman, 4 Bing. 562; S. C., 3 C. & P. 234; 1 M. & P. 474.

(i) Wallace v. McLaren, 1 Man. & Ryl. 516.^b

(k) Stevenson v. Wood, 5 Esp. 200. See also Mavor v. Croome, 1 Bing. 261; S. C., 8 J. B. Moore, 171; Darnton v. Pigman, 3 Peake, 111.

(l) Hodgson v. Gascoigne, 5 B. & A. 88.^k

(m) Waring v. Dewberry, 1 Str. 97.

(n) Hoskins v. Knight, 1 M. & S. 245.

(o) Saunders v. Musgrave, 6 B. & C. 524; S. C., 9 D. & Ryl. 529; 2 C. & P. 294. See also Duck v. Braddy, 13 Price, 455.

(p) Keightly v. Birch, 3 Campb. 521. See also Dig. P. ii. tit. Distress, P. iii. tit. Interpleader.

(1) So if assignees for creditors be permitted to remove on their promise to pay, they are entitled to a credit for the amount. Osborne's Estate, 5 Whart. 267.

^a15 Eng. Com. Law Reps. 73. ^b17 Id. 273. ^c8 Id. 316. ^d7 Id. 35. ^e13 Id. 243.

200. The statute extends to every kind of execution, as for the costs of a nonsuit; (g) (1) so, a sequestration has been held to be within the statute; (r) so, notwithstanding outlawry, in a civil suit; (s) but bankruptcy is not an execution within the statute; (t) and the landlord cannot retain a year's rent against the assignees of the tenant under the Insolvent Act. (x) So, before the 11 G. 4, and 1 W. 4, c. 14, extending the provisions of the 8 A. c. 14 to the county of Durham, the sheriff was not bound to pay the landlord a year's rent out of goods seized under a *pone per vadios* or [*203] *any writ of extent thereon, issuing out of the Court of Pleas of Durham.* (y)

In all cases a landlord is not entitled to a year's rent as against the claims of the Crown, as where goods have been seized under an extent in aid. (z)

Where there are two executions on the tenant's goods, the landlord can demand his year's rent under the statute out of one of them only. (a)

201. As between a mortgagor and mortgagee, the former is not to pay rent to the latter; (b) but since the 4 A. c. 16, dispensing with the necessity of attornment by tenants, notice to the tenant is absolutely necessary in order to entitle the mortgagee to the rent; (c) (2) and where a tenant not having received notice had paid his lessor, the mortgagor, he was excused from paying it again to the mortgagee; (d) and where a mortgagee gives notice to the tenant in possession to pay the rent to him, and he pays it to the assignees of the mortgagor, a court of equity will not order them to refund the rent to the mortgagee; (e) but as to the claims of a mortgagee in case of the bankruptcy of the mortgagor, see further, post, § 205.

6. Liability to pay Rent or otherwise.

202. Where the law creates a duty or charge, and the party is disabled from performing it, without any default on his part, and has no remedy over, the law will excuse him, and therefore if the tenant be evicted from the lands demised *to him, he will thereby be discharged from the [*204] payment of rent, (f) for as the rent is something given by way of retribution for the use and occupation of the thing demised, if the tenant be

(g) *Henchett v. Kimpson*, 2 Wils. 140.

(r) *Dixon v. Smith*, 1 Swanst. 457.

(s) *St. John's College (Oxford) v. Murecot*, 7 T. R. 259.

(t) *Lee v. Lopes*, 15 East, 230.

(x) *Taylor v. Lanyon*, 6 Bing. 536; *m* 4 M. & P. 316.

(y) *Brandling v. Barrington*, 6 B. & C. 467; *n* S. C., 9 D. & Ryl. 609; *sed secus* under that Act, *Gethin v. Wilks*, 2 D. P. C. 189.

(z) *R. v. Decaux*, 2 Price, 17; and see also the saving clause in 11 G. 4 & 1 W. 4, c. 11, s. 2; Dig. ii. tit. Execution. (a) *Dod v. Saxby*, 2 Str. 1024.

(b) *Moss v. Gallimore*, 1 Dougl. 265.

(c) *Id.*

(d) *Watts v. Ognell*, Cro. Jac. 392, recognised in *Birch v. White*, 1 T. R. 384.

(e) *Ex parte Wilson*, 1 Rose, 444; S. C., 2 V. & B. 252. (f) *Gilb. Rents*, 145.

(1) And to execution on the goods of strangers on the property, *Russell v. Doty*, 4 Cow. 576. And to attachments under the act of 1842, *Morgan v. Moody*, 6 W. & S. 333. And to foreign attachment, *Peirce v. Scott*, 4 W. & S. 314. But the Pennsylvania act does not extend to owners of ground-rents, *Pattison v. McGregor*, S. C. Apl. 1845.

(2) Post, § 231.

*m*19 Eng. Com. Law Reps. 161. *n*13 *Id.* 238.

deprived of the land, his obligation to pay the rent ceases; (f) but where a party by his own contract imposes on himself a duty or charge, he is bound to make it good, notwithstanding inevitable accident, (g) therefore under a covenant to pay rent, a lessee is bound to pay the rent during the term, although the house be burnt down, (h) and although the case of fire was expressly excepted under the covenant to repair, (h) for where a party enters into an absolute contract without any qualification or exception, and receives from the party with whom he contracts the consideration for such engagement, he must abide by the contract; (i) and at law it appears to be settled, that, as a consequence of a house being burnt down, a landlord in the absence of any stipulation to the contrary is not bound to rebuild, and the tenant is bound to pay rent; (k) and a covenant that in case the premises are burnt down the lessor shall rebuild, otherwise the rent shall cease, will not be considered as coming under the words "usual covenant." (l)

203. In some of the earlier cases a court of equity would grant an injunction against the landlord's claim of rent until the premises were rebuilt; (m) and a similar decision was come to in *Steele v. Wright*, (n) but where there are no special circumstances, the general rule prevails, that equity follows the law, (1) therefore where the tenant covenanted to repair, "damage by fire only excepted," and the premises *being burnt down, the landlord refused to rebuild the premises, or take a sur- [*205] render of the lease, and commenced an action at law on the covenant for non-payment of the rent accrued due since the fire, on a bill for an injunction, the Court after full consideration decided, that as there was no defence against an action at law, the tenant had no remedy in equity against the unrestricted covenant to pay the rent, (o) and on this principle it has been decided that a tenant has no equity to compel his landlord to expend money received from the insurance office, on the demised premises being burnt down, in rebuilding the premises, or to restrain the landlord from suing for the rent until the premises are rebuilt. (p)

(f) *Gilb. Rents*, 145.

(g) *Baradine v. Jane*, Al. 27.

(h) *Monk v. Cooper*, 1 Str. 763; S. C., 2 Ld. Rayn. 1477, and fully recognised in *Bel-four v. Weston*, 1 T. R. 310, which was precisely a similar case.

(i) *Beale v. Thompson*, 3 B. & P. 420. See also *Baker v. Holzapfel*, 4 Taunt. 45.

(k) *Pindar v. Ainsley*, cited 1 T. R. 312; also in *Doe v. Sandham*, Id. 710.

(l) *Doe v. Sandham*, sup.

(m) *Brown v. Quilter*, Ambl. 619; S. P., *Camden v. Morton*, 2 Eden, 219.

(n) 1 T. R. 708.

(o) *Harc v. Groves*, 3 Anst. 687, recognised and acted upon in *Holzapfel v. Baker*, 18 Ves. 115.

(p) *Cheetham v. Leed*, 1 Sim. 146.

(1) This rule has generally prevailed in the United States as to covenants for payment of rent in case of destruction of the building by fire. *Lamott v. Sterret*, 1 Harr. & John. 42. *Fowler v. Bott*, 6 Mass. 63. *Gates v. Colvin*, 4 Paige, 355; or in case of an eviction by an invading army. *Wagner v. White*, 4 Harr. & John. 564. *Pollard v. Shaffer*, 1 Dall. 210; though in the latter case it was considered a defence to a covenant to repair. In *Ripley v. Wightman*, 4 McCord, 447, it was however held, that where a hurricane rendered an house untenable, this was a good defence to a distress for rent; and in *Kerr v. Merchants' Exchange*, 3 Edwd. C. R. 315, it was held where the demise was of a room merely, and the premises were rebuilt, the lessee was not entitled to a room in the new building. *S. P. Union v. Cornish*, 5 Ohio, 303. If he were liable on his covenant for rent in such a case, a great absurdity would ensue.

204. If the lands demised be evicted from the tenant or recovered by a title paramount, the lessee is for the reason before mentioned(*q*) discharged from the payment of the rent from the time of such eviction; but notwithstanding such recovery or eviction, the tenant shall pay the rent that became due before the recovery, and therefore rent due from a lessee was held not to be extinguished by the lands being extended by the queen, though it accrued between the extent and the liberate;^(r) because the enjoyment of the land being the consideration for which the tenant was obliged to pay the rent, so long as the consideration continued, the obligation must be in force;^(s) but a plea of mere entry by the lessor, or destruction by him of part of the premises, without alleging an actual expulsion, is not sufficient, for these are simple trespasses.^(t)(1)

205. For the same reason if part only of the land let be evicted from the tenant, such eviction is a discharge of *the rent in proportion to the [*206] land,^(u) although formerly where a tenant was evicted before the day appointed for the payment of the rent, such eviction discharged the tenant from the payment of any rent; because before the 11 G. 2. c. 19, there could be no apportionment in respect of part of time, as there might be in respect of part of the land. See further, post, § 220.

So, where a tenant from year to year, at a rent payable half yearly, quitted at the end of a current year without giving notice, and the landlord relet the premises before the end of the next half year, it was held that he had evicted the first tenant and could not recover rent subsequent to the period when he quitted;^(x) and so, when lands have been let to one who underlet to others, and the latter receive notice to quit from the original landlord, in consequence of which one of them quits, and the premises remain unoccupied, this was held to amount to an eviction, and the landlord could not recover for the unoccupied premises;^(y) so, where in consequence of disputes between a landlord and a tenant, the latter said he would leave, to which the former assented, he could not recover the quarter's rent;^(z) but putting up a bill to let the premises which the tenant had quitted

(*q*) See ante, § 202.

(*r*) Playne's case, Cro. El. 47.

(*s*) Hob. 82; 1 Inst. 148; 2 Roll. Abr. 429.

(*t*) Reynolds v. Buckle, Hob. 326.

(*u*) Dy. 56; 10 Co. 128 a.; Roll. Abr. 235.

(*x*) Hall v. Burgess, 8 D. & R. 67.

(*y*) Burn v. Phelps, 1 Stark. 94.^a

(*z*) Grimman v. Legge, 8 B. & C. 324;^b S. C., 2 Man. & Ryl. 438.

(1) Eviction has no effect on rent in arrear. Kessler v. Conachy, 1 Rawle, 442; except as a set-off for damages ensuing therefrom, per Gibson, C. J. Hemphill v. Eckfeldt, 5 Whart. 278. And there is a distinction between an eviction by title paramount or a mere entry, but no expulsion, into part of the premises by the landlord, in which case the defence is pro tanto, Lansing v. Van Alstine, 2 Wend. 561. Bennett v. Bittle, 4 Raw 339; and a wanton eviction by the landlord from any part of the premises or thing demised. Dyott v. Pendleton, 8 Cow. 730. Vaughan v. Blanchard, 1 Yeat. 175. 4 Dall. 124, when the whole rent is suspended. And this eviction may be constructive, as by riotous and indecent conduct on part of the premises reserved, which compelled the tenant to seek another habitation; or by a wrongful distress by a landlord who had granted the reversion and rent incident thereto, reserving a rent. Lewis v. Payuc, 4 Wend. 423. Nor is a tenant bound to resist the grantee of his landlord though he might do so lawfully, but a submission to such a grant will be an eviction by the landlord. M'Elderry v. Flannagin, 1 Harr. v. Gill, 308.

^a2 Eng. Com. Law Reps. 310. ^b15 Id. 229.

without giving the proper notice, did not prevent the landlord from recovering. ^(a)

Where premises are let at an entire rent, an eviction from part, if the tenant thereupon give up possession of the residue, is a complete defence to an action for use and occupation; ^(b) but if the tenant after the eviction continue in possession of the residue, he is liable upon a *quantum meruit*. ^(c) See further as to apportionment of rent, post, § 210, and as to discharge of rent by extinguishment, see post, § 208.

The lessee being a party to the original contract, continues *always liable for rent, notwithstanding any assignment; ^(d) the privity [^{*207}] of contract between the lessor and the lessee not being thereby discharged. ^(e) An assignee on the other hand is liable only when he continues in possession, for his obligation arises out of a privity of estate between him and the assignor, and ceases as soon as that privity ceases; ^(f) he is, therefore, not liable for rent accruing after the assignment over, although the assignment be wrongful; ^(g) an assignee has however been held liable in equity, although the privity of estate has been destroyed, so far as to account for the rent the whole time he enjoyed the land; ^(h) but it is not settled whether an assignee would be restrained from assigning over to a beggar. ⁽ⁱ⁾

On the principle of the continued liability of the lessee, bankruptcy was held not to discharge him from his express covenant; ^(k) so, where a disposition of a lease has been made by virtue of a *fi. fa.* or an *elegit*, the tenant continues liable under the lease; ^(k) and so, although the estate and interest of a covenantor be divested out of him by Act of Parliament, yet without a special clause to release him, he is still liable upon his express covenant. ^(k) In case of bankruptcy, the 6 G. 4, c. 16, has made provision to relieve the bankrupt lessee from his liability to the rent and covenants of his lease.

206. A tenant from year to year, who is under no obligation to repair, may quit without any previous notice, upon the premises becoming unsafe for want of repair or unwholesome for want of drainage; ^(l) ⁽¹⁾ and he will not be liable *for any rent after the occupation has ceased to be beneficial; ^(m) and so where, in doing the repairs, the house is rendered [^{*208}] unfit for the habitation of the tenant or his lodgers; ⁽ⁿ⁾ so, on the same principle where a landlord by his misconduct justifies a tenant in abruptly quitting during a tenancy for a limited period, he can recover rent only for the

(a) Redpath v. Roberts, 3 Esp. 225.

(b) Smith v. Raleigh, 3 Campb. 513.

(c) Stokes v. Cooper, 3 Campb. 514.

(d) Eaton v. Jacques, 2 Doug. 455.

(e) Hornby v. Houlditch, 1 T. R. 93, n; (a) Tovey v. Pitcher, Carth. 177; S. C., Salk. 80; 2 Vent. 228; 4 Mod. 71; 3 Lev. 295; Boulton v. Canon, 1 Freem. 326; S. P., Cooke v. Harris, 1 Ld. Raym. 368; Knightley v. Buckley, 1 Lev. 215.

(f) Paul v. Nurse, 2 Man. & Ryl. 525.

(g) Ib.; but see Knight v. Freeman, 1 Vent. 329; and contra, Le Keux v. Nash, 2 Str 1221; Bull. N. P. 159.

(h) Treacle v. Coke, 1 Vern. 165.

(i) Philpot v. Hoare, 2 Atk. 219; S. C., Amb. 480; Fonbl. Eq. Tr. 351, n.; Bac. Ab. tit. Covenant, (E. 4.)

(k) Auriol v. Mills, 4 T. R. 94.

(l) Collins v. Barrow, 1 Mood. & Rob. 112.

(m) Ib.

(n) Edwards v. Hetherington, 7 D. & Ryl.; S. C., Ry. & Mood. 268; S. P. Salisbury v. Marshall, 4 C. & P. 65.^b

(1) Ante, 199, n. 2.

^a16 Eng. Com. Law Reps. 271. ¹19 Id. 275.

time that there has been an actual occupation; (o) so, where a colliery became not worth working and the lessee offered to pay for all the coal that could be got, he was relieved in equity against the future rent, and the covenants; (p) but where A. agreed to purchase B.'s equitable interest in land for a term of years at a rent specified, it was held that after paying the rent for several years and acknowledging that a further sum was due, he could not resist B.'s claim for such further rent, by shewing that he was not able to use the land. (q)

207. An executor is liable for arrears of rent incurred in the lifetime of his testator, for although the person of the tenant was not chargeable with the rent at law, but only the land by way of distress, yet it was held that his executor should pay the arrears as far as he had assets; (r) but an executor may relinquish the lease, if the property be insufficient to pay the rent. (s) If however he enters on the demised premises, he becomes an assignee, and in that character he is liable to the lessor; (t) but where one of two executors entered, such entry was held not to accrue as the entry of the two, so as to make them both liable; (u) and where the party is charged as executor or administrator, he is liable to the extent of assets, but when as [209] assignee, only to the extent of the profits received in respect of the particular premises; (v) but it seems not settled whether there is any distinction between an executor and an administrator. (w)

If the whole rent incurs in the lifetime of the testator, the action to recover it from the executor must be brought against him in his representative character; (x) see further as to the recovery of rent, post, § 221.

V. Extinguishment and Suspension of Rent.

§ 208. Discharge by Extinguishment.
Suspension.
Distinction between Rent-Service
and Rent-Charge.

§ 209. Extinguishment by Conjunction of
Estates.
by Confirmation.
by Grant.
by Purchase.

209. Extinguishment by Lease.

208. As the tenant is discharged from the payment of rent when the land is evicted by a title paramount, so by a parity of reason, he shall be discharged from such payment when the lord purchases the tenancy, for in

(o) *Kirkman v. Jarvis*, 7 D. P. C. 678.

(p) *Brown v. Morris*, 2 B. C. C. 311; and see also *Jones v. Shears*, 7 C. & P. 346.^a

(q) *Connelly v. Baxter*, 2 Stark. 525.^b (r) *Eton College v. Beauchamp*, 1 Chan. Ca. 121.

(s) *Reid v. Ld. Tenterden*, 4 Tyr. 111. (t) *Went. Off. Ex.* 120.

(u) *Nation v. Tozer*, 1 C. M. & R. 172; S. C., 4 Tyrw. 561.

(v) *Rubery v. Stevens*, 4 B. & Ad. 241.^c See also *Hargrave's case*, 5 Co. 3; *Bolton v. Canham*, *Freem.* 327; S. C., *Pollexf.* 125; *Helier v. Casebest*, 1 Lev. 127; *Buckley v. Pirk*, 1 Salk. 316; *Remnant v. Bremridge*, 8 Taunt. 191; ^d S. C. 2 J. B. Moore, 94.

(w) *Tremere v. Morrison*, 1 Bing. N. C. 89; ^e S. C., 4 Moore & Sc. 603.

(x) 1 Roll. Abr. 603 (S.) pl. 9; *Fruen v. Porter*, 1 Sid. 379.

^a32 Eng. Com. Law Reps. 537. ^b2 Id. 458. ^c24 Id. 50. ^d4 Id. 66. ^e27 Id. 315.

such case the lord cannot have both the land and the rent, nor shall the tenant be under any obligation to pay the rent, when the land, which was the consideration, is resumed by the lord into his own hands: and this resumption or purchase of the tenancy by the lord makes what is called in the books an extinguishment of the rent ;(y)(1) but if the conveyance to the lord was not absolute, but upon condition, or if it were only of a particular estate of shorter duration than the estate which the lord had in the rent-service, in these cases, though *there were a union of the tenancy [*210] and the rent in the same hand, yet as this union was but temporary (for upon the performance of the condition or determination of the particular estate, the tenant is restored to the enjoyment of the land, and consequently, the obligation to pay the rent revives) therefore the rent in such case was only suspended, and not extinguished ;(z)(1) so, if land descend to two co-parceners in fee, one of whom had a rent-charge in fee, issuing out of the land, the rent it seems is suspended until partition made.(a)

A distinction has however been taken between a rent-service and a rent-charge, for if a man who has a rent-service purchases part of the land out of which the rent issues, the rent-service is not extinguished but apportioned, so that such purchase is a discharge to the tenant for so much of the rent only as the value of the land purchased amounts to ;(b) but if a man has a rent-charge and purchases part of the land out of which the rent issues, the whole rent is extinguished and the tenant consequently discharged from the payment of it, and the reason for this extinguishment is—that the rent is entire, and issuing out of every part of the land,(2) therefore by purchase of part it is extinct in the whole and cannot be apportioned, for a rent-charge was against common right, and the law carried such contracts into execution only so far as the rent could take effect according to the original intention of them; when therefore the grantee purchases part of the land, it becomes impossible, by his own act, that the grant should have its due operation ;(c) but this rule is confined to cases where it is the act of the party.(d)

209. There may be an extinguishment in different ways, as by a conjunction of estates, as where A. leases to B. for 100 years, and B. leases to C. for 20 years, rendering *rent; A. granted the reversion to J. S., and J. S. purchased the reversion of the term, held that J. S. shall [*211] have neither the rent nor the re-entry.(e) If A. devises rent to B., and afterwards makes B. executor, there this rent shall be extinct, but where a man devises the term to one, and a rent out of it to another, and afterwards makes him to whom the rent was devised his executor, he may now elect to have this as legatee.(f)

So rent may be extinguished by confirmation, as where a lease was made for life rendering rent, and after the lessor granted and confirmed the same

(y) *Clun's case*, 10 Co. 128; *Vaugh.* 199; *Pollexf.* 142.

(z) *Bro. Extinguishment*, (1); *Vaugh.* 39, 299; *Pollexf.* 142.

(a) 1 *Inst.* 149, b; 1 *Roll. Abr.* 236.

(b) *Litt. s.* 222; *Talbot's case*, 8 Co. 105.

(c) 1 *Inst.* 147, b; *Gilb. Rents*, 152.

(d) See *infra*, § 209.

(e) *Lord Treasurer v. Barton*, *Moor*, 94, pl. 232.

(f) *Gough v. Howard*, 3 *Bulst.* 122.

(1) *Phillips v. Bonsall*, 1 *Bin.* 142.

(2) *Crawford v. Crawford*, 2 *W.* 240. See *query Addams v. Helfenstein*, 9 *W.* 529.

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tenements, the better opinion was that by this the rent was extinct ;(g) so, where lessee of twenty acres rendering rent, grants all his estate in one of the acres to J. S., and the lessor confirms the estate of J. S., that the entire rent was held to be gone in the other acres, being an entire contract ;(h) but if a man has a rent-charge out of certain land and he confirms the estate which the tenant has in the land, yet the rent-charge remains to the confirmor.(i)

So, by grant there may be an extinguishment, as where a lease was made of 100 acres of land rendering rent, and afterwards the lessor granted 50 acres of it, it was held that the grantee should not have any part of the rent, but it was all destroyed ;(k) so, if the grantee of a rent-charge grants it to the tenant of the land and a stranger, it shall be extinguished but for the moiety, and so it is of a seignory ;(l) so limiting a remainder over of the land by him to whom the rent was first reserved upon the render by fine of the land entailed, was held to be extinguishment of the rent, and that it could not go to the remainderman.(m)

[*212] So, there may be extinguishment by purchase of parcel *of the land, as where an annual sum is granted out of lands, so that it may be rent or annuity at the election of the grantee, if the grantee purchases parcel before election, he cannot make election afterwards, but the whole is extinguished ;(n) because the law *primâ facie* says, that this was a rent-charge and not an annuity ;(o) but if before election parcel descends on the grantee, if he brings writ of annuity, the annuity is not apportionable, but he shall have the annuity entirely.(p) And see further as to the distinction between a rent-service and a rent-charge in case of such purchase, ante, § 208.

So there may be extinguishment by release, as if the lessor grants to the lessee for life, that he shall be discharged of the rent, this is a good release ;(q) but there is a diversity between several estates in several lands, and several estates in one land ; for if there be tenant for life of lands, the reversion in fee over to another, if they two join in a grant of a rent out of the lands, if the grantee releases either to him in reversion or to tenant for life, the whole rent is extinguished, for it is but one rent and issues out of both estates ;(r) so, if two tenants in common of land grant a rent-charge of forty shillings out of the same to one in fee, and the grantee releases to one of them, this shall extinguish but twenty shillings, for that the grant in judgment of law is several ;(s) so, by the release of a seignory a rent-charge is extinct ;(t) so, if a lease be made to begin at Michaelmas, reserving a rent, and before the day the lessor releases all the right that he has in the land, this cannot enure to enlarge the estate but to extinguish the rent ;(u) so, where lessee for years assigns the term, and lessor releases all demands to the first lessee, this does not determine the rent, being after the assignment of the term, *only rent due before the release may be extinct by the release.(x) So, there may be an extinguishment of rent by surren-

(g) Bro., Extinguishment, pl. 28, citing 22 Ass. 18.

(h) Goddard's case, Ow. 10.

(i) Litt. s. 536.

(k) Wiseman v. Warrenger, 2 Leon. 252, pl. 339, citing 32 H. 8. (l) 1 Inst. 307, b.

(m) White v. Gerishe, Moor, 575.

(n) Fulwood v. Ward, 2 And. 4.

(o) Sprint v. Hicks, 2 Bulstr. 149.

(p) Fulwood v. Ward, sup.

(q) 1 Inst. 264.

(r) Id. 267.

(s) 1 Inst. 267, b.

(t) Id. 305.

(u) Id. 270, a. b. citing Woodhouse v. Paston.

(x) Collins v. Harding, Moor. 544, pl. 723.

der, as where lessee for twenty years leases for ten years, and afterwards surrenders the term, the rent is gone, and the term for ten years continues.^(y)

VI. Apportionment of Rent.

I. In respect of Part of the Land.

a. *When Apportionment is absolutely admitted.*

§ 210. In case of Descent. In case of a Grant. In case of a Devise. In case of a Recovery.	§ 211. In case of Re-entry. What an Eviction. In case of Surrender. In case of Purchase.
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b. *Apportionment admitted or otherwise.*

212. Distinction between Grant of Rent and Reservation of Rent.	216. By Act of God.
213. Distinction where it is by Act of the Party, of the Law, or of God. By Act of the Party.	217. No Apportionment where Rent-Serv. is entire.
214. By Act of Law.	218. Distinction between Rent in Gross and Rent incident to the Reversion.
215. Other Cases of Rent apportionable by Act of Law.	

c. *Manner of making Apportionment.*

219. By the Jury.	219. Upon what Pleas.
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II. Apportionment in respect of Part of Time.

220. At Common Law.	220. By statute.
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210. Apportionment of rent is of two kinds; namely, first, in respect of part of the land, and next in respect of time.

I. In respect of Part of the Land.

This kind of apportionment may be considered—first, as to the cases where such apportionment is absolutely admitted; *and next as to the cases where it is or is not admitted; and lastly, as to the [*211] manner of making the apportionment.

a. *Where Apportionment is absolutely admitted.*

Rent may be apportioned as it is extinguished by different means, thus, it may be apportioned by descent, as if a man has a rent-charge, and his father purchases parcel of the tenements charged in fee, and dies, and this

(y) Blackstone v. Heath, Godb. 279, pl. 396.

parcel descends to his son who has the rent-charge, now this charge shall be apportioned according to the value of the land, because such portion of the land purchased by the father comes to the son not by his own act, but by descent and course of law ;(z) and so, if the father be grantee of a rent, and the son purchases part of the land charged, and after the death of the father the rent descends to the son, the rent shall be apportioned ;(a) but as a rule a rent-charge cannot be apportioned by the act of the party, yet to this rule there are exceptions, for if the grantee releases part of his rent to the tenant of the land, such release does not extinguish the whole rent ;(b) so, if the grantee gives a part of it to a stranger, and (before the 4 A. c. 16, the tenant had attorned) such release makes no alteration in the original grant ;(b) so, if a rent-charge be extended for debt it is apportionable ;(c) a rent-service in the like case is always apportionable.(d)

So there may be an apportionment in the case of a grant.(1) Although it was at first doubted whether a rent-service incident to the reversion might be apportioned by a grant of part of the reversion, yet it is now otherwise settled, and it has been accordingly determined that if a man makes a lease of three acres, each of equal value, rendering three shillings rent, and the lessor grants the reversion of one *acre, the grantee shall have [*215] 12*d.* rent, for although it was one lease, one reversion, and one rent, yet that was incident to the reversion, which was severable ;(e) so, if A. seised of one acre in fee, and possessed in a term for years in another, grants a rent out of both to B. in fee, and B. takes a lease or grant of the leasehold acre, the rent shall not thereby be suspended.(f)

So, there may be an apportionment by devise, as if A. possessed of a term for twenty years, leases it for ten years, reserving 30*l.* rent, and afterwards A. devises 20*l.* of the rent to three of his sons, equally to be divided between them, it was held that this was a good devise, and each of the sons should have his action of debt for his third part.(g)

So, there may be an apportionment in case of a recovery ; therefore, if part of the land be recovered the rent shall be apportioned ;(h) so, if the father within age purchases parcel of the land charged, and aliens within age, and dies, and the son recovers or enters, yet the land shall be apportioned ;(i) so, where a man seized in fee takes a wife and makes a feoffment, the feoffee grants a rent-charge of 10*l.* out of the land to the husband and wife and the heirs of the husband, the husband dies, and the wife recovers the moiety for her dower, held that the rent-charge should be apportioned, and she might distrain for her share of the rent ;(k) and in some cases a rent-charge shall not be wholly extinct where the grantee claims

(z) Litt. s. 224.

(a) Id. 149, b.

(b) Id. 148.

(c) Wootton v. Shirt, Cro. El. 742.

(d) See ante, § 208.

(e) Wild's case, 8 Co. 79 b. See also Huntly's case, Dy. 326 ; Swinnerton v. Miller, Hob. 177 ; Collings v. Harding, Cro. El. 606, 13 Co. 57 ; Moor, 544.

(f) Butt's case, 7 Co. 23.

(g) Ards v. Watkins, Cro. El. 637. See also Huntly's case, Dy. 326 ; Moor. 737 ; Ewer v. Moyle, Cro. El. 771 ; Roll. Abr. 234.

(h) Bro. Apportionment, pl. 24 ; Moor. 114 ; 1 Inst. 114, a.

(i) 1 Inst. 150, a.

(k) Id. 234, a.

(1) Wherever the reversioner or owner of the rent, either releases part of the rent to the tenant or conveys part to a stranger. Farley v. Craig, 6 Halst. 263.

from and under the grantor, as if B. makes a lease of one acre for life to A. and A. is seised of another acre in fee, and A. grants a rent-charge to B. out of both acres, and does waste in the acre which he holds for life, and B. recovers in an action, the whole rent is not extinct but shall be apportioned and yet *B. claims under A. ;(*l*) so, if the Queen gives two acres of land of equal value to another in fee, fee-tail, for life or years [*216] reserving a rent of two shillings, and the one acre is evicted by a title paramount, the rent shall be apportioned.(*m*)

211. So, there may be an appointment on a re-entry, but where the books speak of an apportionment in case where the lessor enters upon the lessee in part, they are to be understood when the lessor enters lawfully, as upon a surrender, forfeiture and the like.(*n*) but if the lessor act ministerially, as sheriff, in the eviction of the tenant, this will not suspend the rent ;(*o*) so, a mere trespass by the lessor will be no suspension of the rent ;(*p*) so, where a right of common is recovered by the inhabitants, where part of the lands lie which have been let to the lessee, this has been held not to be such an eviction as by the rules of the common law shall make an apportionment of the rent ; for the soil still remains in the lessee.(*q*)

To occasion a suspension of the rent, there must be an eviction or expulsion of the lessee out of all or some part of the demised premises.(*r*)(1)

Whether there may be a suspension in part is not so settled ; my Lord Coke lays it down broadly, that although a rent-service may be extinct for part, and apportioned for the rest, yet it cannot be suspended in part and in *esse* for the rest ;(*s*) but the better opinion appears to be, that in the case at least of a tortious entry by the lessor, the tenant shall be discharged from the payment of the whole rent until he be restored to the whole possession.(*t*) See further, *infra*.

*So, there may be an apportionment in case of a surrender, as, if a man make a lease for life or years, and the lessee surrenders part [*217] to the lessor ;(*u*) *sed secus*, where lessor takes a surrender.(*v*)(2)

So, although as a rule, if the grantee of a rent-charge purchase parcel of the land out of which it issues, the whole rent is extinct,(*x*) yet if the grantor grant that he may distrain for the same rent in the residue of the land, this amounts to a new grant,(*y*) and the same rent shall be taken for the like rent or the same in quantity.

(*l*) 1 Inst. 148, b.

(*m*) *Ib*.

(*n*) *Id*. See also Dy. 5, a ; Moor, pl. 255 ; 13 Co. 58.

(*o*) Vochell v. Doncastell, Moor. 891.

(*p*) Hunt v. Cope, Cowp. 242. See also Roper v. Lloyd, T. Jo. 148.

(*q*) Jew v. Tirkwell, 3 Chan. Rep. 12 ; S. C., 1 Chan. Ca. 31.

(*r*) Dorrell v. Andrews, Hob. 190 ; Hodgkins v. Robson, 1 Vent. 277 ; Timbrell v. Bullock, Sty. 446.

(*s*) 1 Inst. 148, b.

(*t*) Hodgkins v. Robson, 1 Vent. 277 ; S. C., *nom*. Hodgson v. Thornborough, 2 Lev. 143 ; Pollexf. 141.

(*u*) 1 Inst. 148, a.

(*v*) See *infra*, § 213.

(*x*) See *ante*, § 208.

(*y*) 1 Inst. 148, a.

(1) 1 Ante, 205, n. 1.

(2) And the right to distrain cannot exist after such surrender even if all powers of the landlord be reserved by express agreement ; for the relation is at an end. *Bain v. Clark*, 10 Johns. 424.

b. Apportionment admitted or otherwise.

212. As to the cases where apportionment is not admitted, except under special circumstances, distinction has, in the first place, been taken between the grant of a rent, and the reservation of a rent; for if a man be seised of two acres of land, of one in fee-simple, and of another in tail, and by his deed grant a rent out of both in fee, in tail, or for life, &c., and dies, the land entailed is discharged, and the land in fee-simple remains charged with the whole rent, for against his own grant he shall not take advantage of the weakness of his estate in part. But if he makes a gift in tail, or a lease for life or for years of both acres, reserving a rent, the donor or lessor dies, the issue in tail avoids the gift or lease, the rent shall be apportioned, for seeing the rent is reserved out of and for the whole land, it is reason that when part is evicted by an elder title, the donee or lessee should not be charged with the whole rent, but that it should be apportioned rateably according to the value of the land.(z)(1)

213. Another distinction is between the cases where it is the act of the party, the act of law, or the act of God.

Where it is the act of the party, as a rule, there shall be no apportionment contrary to the contract of the parties, *and there shall be no [*218] extinguishment or suspension of rent where the whole is done by agreement, but where the lessor enters injuriously and contrary to the will of the lessee, then there may be a suspension of the rent in part;(a)(2) so, if two joint-tenants or co-parceners be on a seignory and one of them disseise the tenant of the land, the other joint-tenant or co-parcener shall distrain for his or her moiety,(b) for one co-parcener shall not be prejudiced by the tortious act of the other;(c) so, likewise, a seignory may be suspended by the act of a stranger; so, if a man grant a rent-charge out of two acres, and after the grantee recovers one of the acres against the grantor by a title paramount, the whole rent shall issue out of the other acre, but if the recovery be by a feint title by covin, then the rent is extinct for the whole, because he claims under the grant;(d) but a rent-charge is not always wholly extinct where the grantee claims from or under the grantor.(e) So, although, if a grantee of a rent-charge purchase parcel of the land, the whole rent-charge is extinct, yet he may release to the tenant a part of the rent and retain part, for in this case he deals only with that which is his own, that is, the rent, and not with the land, as in case of purchase of part.(f) So, if a lease be of three acres reserving a rent upon condition, and the reversion is granted of two acres, the rent shall be apportioned by the act of the parties; but the condition is destroyed, because it is entire, and against common right.(g)

214. There are several cases where a rent shall be apportioned by act of

(z) Id. 148. b.

(a) Hodgkins v. Robson, sup.

(b) 1 Inst. 148. b.

(c) Ascough's case, 9 Co. 135. b.

(d) Doct. & Stud. 1. 2, c. 17.

(e) See ante, § 210.

(f) 1 Inst. 148. a.; 1 Roll. Abr. 235.

(g) 1 Inst. 215. a.

(1) This distinction was recognised in *Franciscus v. Reigart*, 4 W. 116, before it had been decided that ground-rents are rents service.

(2) Ante 204-5, n. 1.

the law,(1) where it cannot be apportioned by the act of the party, as, in the first place, where the grantee of a rent-charge purchases parcel of the land out of which the rent issues, this being an act of the party, the whole is extinguished;(h) but if this parcel descends to the son [*219] of the purchaser, the rent-charge shall be apportioned, because it comes to him by course of law.(i) So, on the same principle, if a man has issue two daughters, and grant a rent-charge out of his land to one of them, the rent shall be apportioned.(k) So, where one leases one acre of borough English and another of gavelkind tenure, by one entire rent, and having issue two sons, dies, the rent shall be apportioned according to the course of descent.(l) So, where the reversion devolves upon different classes of representatives of the lessor, as where one seised in fee of Black Acre, and lessee for twenty years of White Acre, leases both by one demise for ten years, rendering an entire rent, and dies, whereupon the reversion of Black Acre descends upon the heir, and that of White Acre goes to the executor, the rent shall be apportioned according to the reversion.(m)

So, where a common man is a conusee in a statute merchant or recognisance, and purchases parcel of the land, the whole rent is extinct, but it is otherwise in the case of the Queen, for if she purchases parcel, she shall have execution of the other lands which are in the hands of others.(n)

So, again, a rent reserved upon a lease for years shall not be apportioned by the act of the lessor, but otherwise by act of law, as where a tenant makes a feoffment in fee of part of the land, and the lessor enters.(o)

But, in respect of the realty only rent is apportionable, for the personalty shall not be divided by act of law; therefore if execution be sued of body and lands upon a statute merchant or staple, and after the inheritance of part of those lands descend to the conusee, all the execution is avoided, for the duty is personal and cannot be divided by act of law;(p) *so, [*220] where there is a lease of land and a flock of sheep, and after, upon a recognisance made by the lessor, the land is evicted, it was held that there should be no apportionment of the rent, and that the lessee should hold the sheep without any allowance;(q) so, where a man leases land of which he is seised in fee, and other land of which he is tenant for life with a power of leasing, and the lease is not well executed according to the power, it was held, that the lease was good after the death of the lessor for the lands in fee, though not for the other lands, for the rent shall be apportioned;(r) so, if A. seised of one acre in fee and possessed of another for years, makes a lease of both, reserving one entire rent, and dies, the rent shall be apportioned with the reversion, and the heir and executor shall have his propor-

(h) See ante, § 208.

(i) Litt. s. 224.

(k) 1 Inst. 149. b.

(l) Rushden's case, Dy. 4 b; Ewer v. Moyle, Cro. El. 771.

(m) Moody v. Gannon, 1 Roll. Abr. 237, (D. 5;) S. C., 3 Bulstr. 153.

(n) Sav. 69, pl. 143.

(o) Wiseman v. Warringer, 2 Leon. 252; S. C., Godb. 95.

(p) 1 Inst. 150. a.; see also 2 Vent. 327.

(q) Emot's case, Dy. 212 b, marg. pl. 38; see also Read v. Lawrence, Dy. 212; also Bro., Apportionment, pl. 24, citing 7 H. 7, 4, 5.

(r) Doe v. Meyler, 2 M. & S. 276, overruling Rees v. Phillip, 1 Wightw. 69, and reccg Stevenson v. Lambard, 2 East, 575.

(1) As if part of the premises subject to rent service be taken for a public street, Cuthbert v. Kuhn, 3 Whart. 357, the owner of the rent receives part of the compensation.

tion;(s) so, if a husband leases for years, reserving rent, and dies, the wife recovers a third part of the reversion, she shall have the same proportion of the rent, for in all these cases the law distributes the rent as it disposes of the reversion.(s) See further, as to the discharge of the tenant in case of eviction, ante, §§ 205, 206.

215. There are several other cases where by act of law a rent is apportionable, which would not otherwise be so, as if a moiety of a reversion be extended by *elegit*, the rent shall be apportioned, and the lessor shall still enjoy half the rent as incident to the reversion that remains in him.(t)(1)

216. As to apportionment by the act of God, if a man leases land for life or years rendering rent, and after part of the land is surrounded by water, [*221] this will not make any *apportionment of the rent, because the soil remains and may be regained again; but if part of the land be covered with the sea this will make an apportionment, as by ordinary intendment, there is no probability of regaining it;(u) so, if land demised be burnt by wild fire, there shall be no apportionment, because the land remains and cannot be rendered altogether unprofitable.(u)

217. There are some few other cases where the law of apportionment does not apply, or only under certain restrictions, as where the rent-service is something whole and indivisible, as a house, &c., and the lessor purchases part of the land, such rent is wholly extinct, because it cannot be severed or apportioned;(v) so, where a man has common of pasture *sans nombre* in twenty acres of land, and ten of those acres descend to A., the common *sans nombre* being entire and uncertain cannot be apportioned, *sed secus* if it had been a common certain as for ten beasts;(x) so, if three joint-tenants hold by an entire yearly rent, as of a horse, &c., and the tenants cease for two years, and the lord recovers two parts of the land granted against two of them, and the third saves his part by tender of the rent; although the lord comes to the two parts by lawful recovery, yet the entire rent shall be extinct;(y) but if an entire service be *pro bono publico*, as to repair a bridge or a way and the like, then although the lessor purchases part, yet the service remains.(y)

218. Again, there is a diversity between a rent in gross and a rent incident to the reversion, concerning the apportionment thereof, as if a man enfeoff B. of one acre in fee upon condition, and B. being seised of another acre in fee grants a rent out of both acres to the feoffor, who enters into the one acre for the condition broken, the whole rent shall issue out of the other acre, because his title is paramount*the grant; but if a man make [*222] a lease for life of Black Acre and White Acre, reserving two shil-

(s) 1 Roll. Abr. 237.

(t) Campbell's case, 1 Roll. Abr. 237.

(u) 1 Roll. Ab. 236.

(v) Litt. s. 222.

(x) 1 Inst. 149. a.

(y) Ib.; see also Bruerton's case, 6 Co. 1, 2.

(1) This cannot be separated from the reversion by an execution. *Montague v. Gay*, 17 Mass. 439.

lings rent, upon condition that if the lessee does such an act that then he shall have fee in Black Acre, the lessee performs the condition, yet, although by relation he has the fee-simple *ab initio*, shall the rent be apportioned, for the reversion of one acre whereunto the rent was incident is gone from the lessor.(z)

c. Manner of making Apportionment.

219. The making an apportionment is properly the business of a jury, who upon the evidence offered are to judge of the value of the land purchased by the lessor, or aliened by the tenant;(a)(1) but if the lessee re-demise part to the lessor reserving a rent, there shall be no apportionment, for the parties by the reservation have ascertained what rent shall be allowed for that part;(a) so, if part be assigned by the lessee to a stranger, who assigns it to the lessor, there shall be no apportionment, for the lessor comes under the benefit of the stranger's contract.(a)

An apportionment may be made upon a plea of *nil debit* pleaded by the tenant, because when issue is joined on such plea, it is the business of the jury to determine whether anything and how much is due;(a) but the rent cannot be apportioned upon a demurrer because the judges only determine what is the law in the case, but the value of the land never comes in question;(a) and where the apportionment is made between the landlord and the purchaser of part of the reversion without the privity of the tenant, he is not bound by it, and may dispute its propriety;(b) and consequently the purchaser would, by the conveyance of the vendor without the concurrence of the lessee, not acquire the same rights against the lessee, as he would have acquired if the annual rent had been legally apportioned by the *jury,(c) and the defendant may in his pleading set forth the value [*223] of the land and to what the apportionment shall be.(d)

II. Apportionment in respect of Part of Time.

220. At common law there should never be an apportionment in respect of part of the rent as there should have been upon an eviction of part of the land;(e)(2) therefore if a tenant for life died before the day on which the rent became due, his executors could not claim an apportionment of the rent; nor could the remainderman or reversioner claim that part of it which accrued during the life of the tenant for life, so that the tenant paid nothing.(f) The 11 G. 2, c. 19, s. 15, has remedied this defect in the law

(z) 1 Inst. 148, b.

(a) *Hodgkins v. Robson*, 1 Vent. 276.

(b) *Bliss v. Collins*, 5 B. & A. 876.^a

(c) *Ib.* See also S. C., 4 Madd. 229.

(d) *Hodgkins v. Robson*, sup.

(e) 10 Co. 123.

(f) *Jenner v. Morgan*, 1 P. Wms. 392.

(1) *M'Elderry v. Flannagan*, 1 Harr. & Gill, 308. *Cuthbert v. Kuhn*, 3 Whart. 366.

(2) *Bank of Penna. v. Wise*, 3 W. 394. And the reason is, that no part becomes due until the day of payment; otherwise of amounts growing due from day to day, though payable for convenience on a particular day. As a charge reserved by a widow in lieu of dower. *Sweigart v. Berks*, 8 S. & R. 306. Or an annuity accepted by her in lieu of dower. *Gheen v. Osborn*, 17 S. & R. 171. By act of 1834, § 8, the stat. of 11 Geo. 2, has been re-enacted in substance as regards rents, and it is said to have been generally adopted in this country, 3 Kent's Com. 470.

by giving the rent due for the portion of the time that has elapsed of the quarter to the executors and administrators. In order that the rent may be apportionable under the statute, the demise must determine by the death of tenant for life. If the lease be such as to bind the remainderman, then the whole rent goes to him, and there is no apportionment.^(g) Before the 4 & 5 W. 4, c. 22, it was doubtful whether the first statute extended to tenants *pur autre vie*, or tenants in tail;^(h) therefore, when an incumbent had leased the glebe and tithes of his living, and the lease expired by his death, the tenant having paid a whole year's rent to the successor, it was held that the executors of the last incumbent was entitled to an apportionment of the rent up to the time of his death;⁽ⁱ⁾ and time has been held to be the measure of the apportionment in respect to tithes, as in respect to the profits of the land.^(k)

[*224] *In the case of dividends of stock, it was held that the remainderman, and not the executors, was entitled to a proportional share thereof to the time of the death of tenant.^(l)(1)

VII. Recovery of Rent.

§ 221. Means of recovering Rent.

I. Remedy by Distress.

222. In what Cases.

a. *Who may distrain.*

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| § 223. Donor or Lessor. | § 230. Husband in right of Wife. |
| 224. Bailiff or Agent. | 231. Mortgagee. |
| 225. Receiver. | Annuitant. |
| 226. Co-parcener. | 232. Guardians and Committees. |
| 227. Joint-Tenants. | 233. Executors. |
| 228. Tenants in Common. | 234. Corporations. |
| 229. Tenants in Tail. | The Crown. |

b. *What Things may be distrained, or otherwise.*

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| 235. General Rule. | Cattle agisting. |
| Exceptions. | 238. Beasts of the Plough not distrainable. |
| Things of no value. | 239. Nor Goods delivered to Tradesmen. |
| Dogs, &c. | Goods left at Inns. |
| Deer. | 240. Nor Goods in the Custody of the Law. |
| 236. Things fixed to the Freehold not distrainable. | 241. Nor Money in a Bag. |
| 237. Cattle, when distrainable. | Nor Crops of sown Corn, when. |
| Cattle within View of the Landlord. | |

(g) Ex parte Smyth, 1 Swanst. 337.

(h) See Paget v. Gee, Amb. 198; Whitfield v. Pinder, cited in Vernon v. Vernon, 2 B. C. C. 662; also Dig. P. ii. tit. Apportionment.

(i) Hawkins v. Kelly, 8 Ves. 308.

(k) Aynsley v. Wordsworth, 2 V. & B. 331, overruling Williams v. Powell, 10 East, 268.

(l) See Pearly v. Smith, 3 Atk. 260. Sherrard v. Sherrard, Id. 502; Wilson v. Harman, 2 Ves. 672.

c. *Time of making distress.*

242. Not at Night.

| 242. On what Days of the Year.

d. *Place where Distress may be made, or otherwise.*

243. Upon the Land.

244. Distraining out of the Fee.
Fraudulent Removal.245. Distraining on any Part of the Land.
Breaking in to Distrain.
Several Distresses.*e. *Manner of making a Distress, and the Proceedings thereon.* [*225]246. Acts of the Landlord and his Agent.
Liability of the Landlord.

247. Appointment of a Bailiff, &c.

248. Manner of disposing of the Distress.

249. Sale of the Distresses.

250. User of the Distress.
Impounding Animals.II. *Remedy by Entry.*

251. Necessity of Demand.

| 251. When Demand dispensed with.
252. *Nomine Pœnæ*.III. *Remedy by Action.*253. Action of Debt at Common Law.
By Statute.254. Executors and Administrators.
Of Tenant for Life.

255. Holding over.

255. Double Value under 4 G. 2, c. 28.

256. Double Rent under 11 G. 2, c. 19.

257. Action for Use and Occupation.
Where it lies.

258. Where it does not lie.

§ 221. The means for recovering rent are—1. The remedy by distress ;(1)
2. By entry ; 3. By action or suit ; 4. By statute.

I. *Remedy by Distress.*

222. The remedy by distress is by the common law incident to a rent service, but in case of a rent-charge, it must expressly be provided for by the deed.(m) Under this head may be considered—1. Who may distrain ; 2. What may be distrained ; 3. Manner of making a distress and proceedings thereon ; 4. Place where distress is to be made. See further, as to distress, post, INJURIES TO THINGS REAL AND THEIR REMEDIES.

a. *Who may distrain.*

223. If a man seised in fee makes a gift in tail, or a lease for life or years, or at will, saving the reversion to himself,(2) with a reservation of rent or other services, the law gives *the donor or lessor, without any [*226] express provision, remedy for such rent or services,(n) and this my Lord Coke calls a rent distrainable of common right ;(o) but if the donor

(m) See ante §§ 151, 152.

(n) Lit. s. 214.

(o) 1 Inst. 142, a., citing H. 4, 15 ; see also Bro. Distress, 78 ; Moor, 36 ; Cro. El. 637.

(1) This remedy generally exists in the U. S., though there are some exceptions. 3 Kent's Com. 472.

(2) Ante, 170, n. 1 ; Prescott v. Deforest, 16 Johns. 159.

or lessor do not reserve the reversion, he cannot distrain of common right; therefore if a lessee for years assigns his term, reserving to himself a rent, he cannot enforce the payment of such rent by distress,⁽¹⁾ because a rent so reserved was not distrainable for at common law, and not being a rent-seck, it did not fall within the 4 G. 2, c. 28, s. 5, which gives such remedy for a rent-seck.^(p) So, if termor lease for remainder of term,^(q) and if a man seised in fee or for life of a rent-charge, after arrearages incur, grant over the rent to another, he cannot distrain for the arrearages, because they are by the grant divided from the freehold;^(r) but this is to be understood with some exceptions, as in case of rent granted by one coparcener to another for equality of partition, the grantee may distrain of common right, though she has no reversion,^(s) lest she should be without remedy;^(t) and so in the case of a donor;^(t) but a party may reserve to himself a power of distraining,^(u) and a tenant from year to year, underletting from year to year, has a sufficient reversion entitling him to distrain.^(x)

224. A bailiff who distrains must show in whose right he does so.^(y) An authority to tenants to pay rent to J. S., whose receipt shall be their discharge, does not entitle him to distrain, although he receives the rent for his own benefit.^(z)

*225. After the attornment of the tenants a receiver may distrain [*227] in his own name and on his own authority, without any special leave of the court; but before attornment he must distrain in the name of the person having the legal estate;^(a) and if there be any doubt as to who has the legal estate, the receiver must in that case make application to the court for an order to distrain.^(b) So, if the owner be in possession, the receiver cannot distrain, but must apply to the court for an order directing the owner to give up possession to the receiver;^(c) so, if rent be in arrear for more than a year, a receiver cannot distrain without an order of the court.^(d)

226. Coparceners are considered in law but as one heir;^(e) therefore, they, as a rule, must join in making a distress;^(f) and one of two coparceners cannot make an avowry for a moiety before partition, although they have several inheritances;^(f) after partition they or their grantees may avow severally;^(g) so, before partition, one of several co-heirs may distrain for

(p) — v. Cooper, 2 Wils. 375; recognised in *Parmenter v. Webber*, 8 Taunt. 593; 1 S. C., 2 J. B. Moore, 656.

(q) *Preece v. Corrie*, 3 Bing. 24; 1 S. C., 2 M. & P. 57; recognised in *Pascoe v. Pascoe*, 3 Bing. N. C. 905.^e (r) *Ognell's case*, 4 Co. 50; S. C., cited *Vaugh.* 40.

(s) *Litt. s.* 262.

(t) 1 Inst. 169, b.

(u) *Id.* 47, a.

(x) *Curtis v. Wheeler*, M. & M. 493; 1 S. C., 4 C. & P. 196.^e

(y) *Bro. Distress*, 78.

(z) *Ward v. Shew*, 9 Bing. 608; 1 S. C., 2 M. & Sc. 756.

(a) *Hughes v. Hughes*, 3 B. C. C. 85; S. C., 1 Ves. Jun. 161; and see 1 Ball and Bea. 483.

(b) *Pitt v. Snowden*, 3 Atk. 750.

(c) *Griffiths v. Griffiths*, 2 Vez. 400.

(d) *Brandon v. Brandon*, 5 Madd. 473.

(e) 1 Inst. 164, a.

(f) *Stedman v. Page*, 1 Salk. 390; S. C. 5 Mod. 141; Comb. 347; S. C. nom. *Stedman v. Bates*, 1 Ld. Raym. 64.

(g) *Buttler and Baker's case*, 3 Co. 22, b.

(1) *Ege v. Ege*, 5 W. 134.

^a4 Eng. Com. Law Reps. 214. ¹⁵ *Id.* 353. ³² *Id.* 374. ²² *Id.* 367. ¹⁹ *Id.* 340.

²³ *Id.* 396.

rent due to herself and her co-heirs, without an express authority from them so to do; and an avowry by her in her own right, and a cognizance as the bailiff of the others, is sufficient, without averring any authority from them to distrain; (*h*) and there is no difference in this respect between coparceners at common law, and parceners by custom, as parceners in gavelkind. (*h*)

227. One joint tenant may distrain alone, but he cannot avow for the whole as in his own right; he must avow particularly *in his own right, and make conusance as bailiff of the others; (*i*) but as in the [*228] case of coparceners, he is not obliged to have any express authority, and if the others merely decline to act, he may proceed to distrain for rent due to all. (*k*)

228. Tenants in common must sever in avowry, (*l*) "because it goes to the realty, and therefore if three tenants in common distrain for thirty beasts, one of them must avow for ten, the other for ten, and the third for ten; (*l*)" and payment of the rent to one tenant is not payment to the other, therefore when a terre-tenant after notice paid the rent to one, it was held that the other might distrain for his share, (*m*) and they may make several distresses; therefore where land was demised by four persons (whose title did not appear) at one entire rent, and one of them distrained for his share, the distress was held to be regular, for whatever might have been the interest of the landlord as between themselves, as between them and the terre-tenant they were tenants in common, and entitled each to a separate distress; (*n*) so, in an early case it had been decided that one tenant in common might take a distress, without his companion, and avow solely. (*o*) But as tenants in common have a joint action for rent, it being in the personality and not in the realty, (*p*) it has therefore been held that the survivor of two tenants in common may distrain for the whole of the rent, although the reservation be to the lessors according to their respective interests. (*q*)

*229. By the 32 H. 8, c. 28, tenants in tail are enabled to make leases so as to bind their issue, and although not made conformable [*229] to the statute, yet such lease is good as against himself, and therefore as a reversioner he may distrain even at common law for the rent reserved thereby. (*r*)

(*h*) *Leigh v. Sheppard*, 5 J. B. Moore, 297; S. C., 2 B. & B. 465.^s

(*i*) *Pullen v. Palmer*, 5 Mod. 72; S. C., Carth. 328; see also 15 H. 7, 17; 12 Mod. 77.

(*k*) *Robinson v. Hoffman*, 4 Bing. 662;^b S. C., 1 M. & P. 474; 3 C. & P. 234.

(*l*) Per Holt, C. J., *Pullen v. Palmer*, 3 Salk. 207.

(*m*) *Harrison v. Barnby*, 5 T. R. 246.

(*n*) *Whitley v. Roberts*, 1 McClel. & Y. 107; see also *Doe v. Mitchell*, 1 B. & B. 11; S. C. 3 J. B. Moore, 229; *Powis v. Smyth*, 5 B. & A. 850;^s S. C., 1 D. & K. 490.

(*o*) *Willes v. Fletcher*, Cro. El. 530.

(*p*) Litt. ss. 315, 316.

(*q*) *Wallace v. McLaren*, 1 Man. & Ryl. 516.^j

(*r*) Ex parte *Smyth*, 1 Swanst. 346, n.

(1) Unless there be a joint lease, in which case they may join. *Jones v. Guidrim*, 3 W. & S. 534.

^s6 Eng. Com. Law Reps. 203. ^b15 Id. 73. ^s5 Id. 4. ^b7 Id. 279. ^j17 Id. 273.

230. At common law if a husband seised in fee, or in tail in right of his wife of a rent-charge, did not recover during his wife's life arrears which became due previously to their marriage, he could not after her death compel payment of them; but now, by the 32 H. 8, c. 37, he or his personal representatives may distrain for the same; (s) and it seems that copyhold lands charged with a rent are within the provisions of the act; (t) it seems however that leases for years are not within the statute, (u) but if the wife's term be demised for years, the reversion is then in the husband, and he may distrain. (x)

331. A mortgagee after giving notice of the mortgage to the tenant in possession, is entitled to rent in arrear at the time of the notice, and to what accrues due afterwards, and may distrain for the same, if the lease under which the tenant holds have been made before the mortgage; (y) but where the lease has been made by the mortgagor alone after the mortgage, then the mortgagee has no remedy but by ejectment, and cannot distrain; (z) and a mere recognition by the mortgagee of the tenant in possession as his tenant will not enable him to distrain. (a) (1)

[*230] *Where an annuity is granted out of an estate, and the grantor, to secure the payment, vests the estate in trustees for a term to the use of the annuitant, the latter may distrain for the arrears. (b)

232. As a guardian may make leases of the infant's land in his own name, so he may like other persons distrain in his own name. (c) Committees of lunatics, like receivers, must act under the directions of the Court of Chancery. See Bradby on Distresses, by Serjeant Adams, 62; Shelford on the Law of Lun. 180.

233. At common law the personal representatives of a man seised of a rent in fee-simple, fee-tail, or for life, could not distrain for arrears of rent

(s) See 4 Co. 51 a.

(t) *Appleton v. Doily*, Yelv. 135; but see *Gilb. Ten.* 187; *Bull. N. P.* 57; 2 *Watk. Cop.* 182.

(u) *Meriton v. Gilbee*, 8 Taunt. 159; ^m S. C., 2 J. B. Moore, 48; *Martin v. Burton*, B. 1 & B. 279; overruling *Powell v. Killick*, *Bull. N. P.* 57; and see *Prescott v. Boucher*, 3 B. & Ad. 862; ⁿ *Jones v. Jones*, *Id.* 967.

(x) *Wade v. Marsh*, *Latch.* 211.

(y) *Moses v. Gallimore*, 1 *Dougl.* 279.

(z) *Evans v. Elliott*, 9 Ad. & E. 342.^o See also *Pope v. Biggs*, 9 B. & C. 245.^p

(a) *Brown v. Stoney*, 1 *Man. & Gr.* 117; ^q S. C., 1 *Scott*, N. S., 9.

(b) *Fairfax v. Gray*, 2 *Bl.* 1326.

(c) *Shopland v. Rydler*, *Cro. Jac.* 55; *Bredell v. Constable*, *Vaugh.* 179.

(1) The right of a mortgagee to distrain, is recognised very generally in the United States. *Newell v. Wright*, 3 *Mass.* 152. *Souders v. Vansyckle*, 3 *Halst.* 313; though in Connecticut the tenants, it appears, first must attorn. *Magill v. Hinsdale*, 6 *Conn.* 469; *Babcock v. Kennedy*, 1 *Verm.* 457; and the same distinction between a lease made before and after the mortgage is recognised on the ground that no privity exists. *McKereher v. Hawley*, 16 *John.* 292; *Souders v. Vansyckle*, 3 *Halst.* 212; *Price v. Sanderson*, 1 *Green. Ch. Rep.* 517. But even then if the tenant consent, to avoid an eviction, it will be a valid payment, *id.*; and *Smith v. Shepherd*, 15 *Pick.* 149, and *Jones v. Clark*, 20 *John.* 60. But in Pennsylvania it is believed this doctrine is not recognised; *Meyers v. White*, 1 *Raw.* 355; for until entry the mortgagee has but a lien. *Rickert v. Madeira*, *id.* 325.

^r *Eng. Com. Law Reps.* iv. 57. ^s *Id.* xxiii. 197, 202. ^t *Id.* xxxvi. 159. ^u *Id.* xvii. 368. ^v *Id.* xxxix. 372.

incurred in the lifetime of a testator or intestate, but this power was given them by the 32 H. 8, c. 37; but the statute applies only to cases where the owner of the rent, if he had lived, might have distrained, and therefore when the rent was in arrear, and the owner had granted away his interest before his death, his executor was held to have no remedy for such arrearages. (d) If a man made a lease for life or a gift in tail reserving a rent, this was a rent-service within the statute, but it was doubtful, whether if a person, seised in fee of lands, made a lease for years, reserving rent, his executor or administrator could not under this statute have distrained for arrears of rent incurred in his lifetime; and in the case of *Prescott v. Boucher* (e) it was decided in the negative, but by the 3 & 4 W. 4, c. 42, s. 37, executors and administrators are authorised in such cases to distrain. See Dig. p. ii. tit. Executors and Administrators.

234. A corporation aggregate cannot distrain in their *own person but by their bailiff, and this it seems must be done by deed. (f) [231]

The queen may reserve a rent out of a franchise or matter incorporeal as well as out of lands, and may distrain for it on any other lands of the tenant not subject to the rent, but not in such other lands of the tenant as are let by tenant, or extended; and by the 22 C. 2, c. 6, the grantee of a farm rent has the same power of distress as the queen had. (g)

b. What Things may be distrained, or otherwise.

235. As a rule, all the moveable chattels of a tenant may be distrained for rent-arrear, (1) but to this rule there are many exceptions and on various grounds, yet such exceptions are fewer now than formerly.

First. A thing to be distrainable must be something in which a man can have a valuable property, and therefore it is said in the books that there can be no distress of dogs, deer, conies, and all other animals *feræ naturæ*; but this rule is held to be too general, for as to dogs, "it is clear now that a man may have a valuable property in a dog; trover has been several times brought for a dog, and great damages have been recovered," (h) and the legislature has made it penal to steal dogs. See Dig. p. i. tit. Larceny.

As to deer it has been expressly decided that when kept in an inclosed ground for the purposes of sale or profit they may be distrained. (i)

236. In the next place, things fixed to the freehold, as doors, windows.

(d) *Ognell's case*, 4 Co. 50; 1 Inst. 162, a.

(e) Sup.

(f) Cro. El. 815; Roll. Abr. 514.

(g) *Attorney-General v. Coventry (Mayor)*, 1 P. Wms. 306.

(h) *Per Willis, C. J., Davies v. Powell, Willes*, 48; see also *Binstead v. Buck*, 2 El. 1117.

(i) *Davies v. Powell*, sup.

(1) *Russell v. Doty*, 4 Cow. 576; *Kessler v. McConachy*, 1 Raw. 435; or a negro of a stranger accidentally on the premises. *Bull v. Horlback*, 1 Bay. 301. But if the tenant quit possession, and sell his goods to a succeeding tenant, they cannot be distrained for the arrears due by the former tenant. *Clifford v. Beams*, 3 W. 246. The rule of the common law has been altered in Kentucky, 2 Dana, 213, and in Virginia, 1 Lomax, Dig. 551, and the remedy confined to the goods of the tenants.

and the like, are not distrainable;(1) for what is part of the freehold cannot be severed from it without detriment to the thing itself in the removal, and as distresses *were considered as pledges, which were to be restored [*232] to the owner *in statu quo*, such things once removed, could not have been so restored. Besides, what is fixed to the freehold is part of the thing demised, and the nature of a distress was not to resume part of the thing itself for the rent, but only the *inducta* and *illata* upon the soil or house.(k)

On this principle an anvil in a smith's shop, and a millstone in a mill are privileged from distress, and a temporary removal of the anvil out of the stock, or the millstone out of the mill, for the purpose of its being picked, does not destroy the privilege.(l) So, for the like reason, corn growing was before the 11 G. 2, c. 19 (see Dig. p. ii. tit. Distress) not distrainable, and so trees, shrubs, and plants growing in a nursery ground cannot be distrained;(m) in this latter case the exemption is in favour of trade, see *infra*, § 239.

237. Cattle on a common were not distrainable before the 11 G. 2, c. 19;(n) but cattle of a stranger trespassing on the land of a tenant may be distrained, although the owner make fresh suit and the cattle be not *levant* and *couchant*;(o) so, a lessor cannot distrain a stranger's cattle, which get into the land whence the rent issues, through defect of fences which either the landlord or the tenant is bound to repair.(p)

If the landlord come to distrain, and the tenant, seeing him, drive the cattle off the land, the landlord may follow the beasts, and distrain them out of the premises if he had once a view of the cattle on his land; but if the beasts go off the land of themselves, he cannot distrain them afterwards,(q) though if the distrainor once enter the premises *to distrain the [*233] cattle, it seems that they cannot afterwards be driven off to prevent a distress.(r)

Cattle which are upon the land by way of agisting may also be distrained for rent;(s) so, where beasts were put into a field to graze for the night, it was held that the landlord might distrain them for rent due out of the lands where they were put, although they had been put in with his consent, such consent not being deemed a waiver of his right to distrain unless it had been so expressly agreed, and being but a parol agreement, it could not alter the original contract between the lessor and lessee, from which the power to distrain arose;(t) but the owner of the cattle was afterwards

(k) 18 E. 3, 4; 1 Inst. 47; 2 Inst. 82; 2 Mod. 61; Gilb. Distr. 42. (l) 14 H. 8, 25 b.

(m) Clark v. Gaskarth, 8 Taunt. 431; 2 S. C., 2 J. B. Moore, 491, recognised in Clarke v. Calvert, 3 J. B. Moore, 96. (n) Sup.

(o) 7 H. 7, 1 b. 2, a.; 15 H. 7, 17 b.

(p) Dy. 317 b. 318 a.

(q) 1 Inst. 161, a.

(r) Clement v. Milner, 3 Esp. 95.

(s) 1 Roll. Abr. 669. (t) Fowkes v. Joyce, 3 Lev. 260; S. C., 2 Vent. 50; 2 Lutw. 1161.

(1) Cresson v. Stout, 17 Johns. 106. Vause v. Russel, 2 McCord, 329; but where the fixtures are severed by the tenant (not for a mere temporary purpose,) they become liable as other chattels. Reynolds v. Shuler, 5 Cow. 500.

relieved in equity on the ground of fraud in the landlord, who had consented to their being put in, that he might distrain them.(u)

238. Again, beasts of the plough and implements of husbandry and tools by which a man gains his livelihood are not distrainable; but these are only conditionally exempt, the former, if there are other moveable chattels to the amount of the rent and expenses;(x) the latter, if they are in actual use, and there is sufficient distress, as in the case of a stocking-frame,(y) or a loom;(z) but where a threshing-machine was not in use, and there was not evidence of other goods being on the premises, this was held not to be privileged from distress.(a)(1)

Some other things, as a horse on which a person is riding, or an axe in the hands of a person cutting wood, have been held to be exempt, on the additional ground, that the exercise of the power of distress might in such cases frequently lead to a breach of the peace.(b)(2) [*234]

239. In the next place, for the benefit of trade, goods sent to a tradesman for the purpose of being worked upon in the way of his trade, as cloth to a tailor, yarn to a weaver, a horse to a smith, and the like, are not distrainable;(c) so, a beast sent to be slaughtered;(d) so, goods in the hands of a factor are privileged.(e)(3)

(u) *Ib.*; and see 2 Wms. Saund. 290, n. (7).

(x) 1 Inst. 47, a. b.; *Piggott v. Birtles*, 1 M. & W. 441.

(y) *Simpson v. Hartopp*, Willes, 512.

(z) *Gorton v. Falkner*, 4 T. R. 565; *Roberts v. Jackson*, Peake's Add. Ca. 37.

(a) *Fenton v. Logan*, 9 Bing. 676; S. C., 3 M. & Sc. 82, recognising *Wood v. Clarke*, 1 Cr. & J. 484.

(b) 1 Inst. 47, a.; see also *Webb v. Bell*, 1 Sid. 440, cited in 4 T. R. 569; *Storey v. Robinson*, 6 T. R. 138.

(c) Bro. Distress, 99; 1 Inst. 47; 3 Bulst. 270; 1 Roll. Abr. 668; *Musprat v. Gregory*, 3 M. & W. 677; S. C., 2 Gale, 158.

(d) *Brown v. Shevil or Sheril*, 2 Ad. & E. 138; S. C., 4 Nev. & Man. 277.

(e) *Gilman v. Elton*, 3 B. & B. 75; S. C., 6 J. B. Moore, 243; *Thompson v. Mashiter*, 1 Bing. 283; S. E., 8 J. B. Moore, 254; *Matthias v. Mesnard*, 2 C. & P. 353; *Adams v. Grane*, 1 Cr. & M. 380.

(1) In Pennsylvania, by the act of 1828, certain goods are exempted from distress and execution; among these are the necessary tools of a tradesman, not exceeding in value twenty dollars, a stove, &c., &c. Under this it has been held that a weaver's loom was included within the term necessary tools. *McDowell v. Shotwell*, 2 Whart. 26. The stove must be in use in his family. *Kessler v. McConachy*, 1 Rawle, 435.

(2) But in Mass., where it seems an attachment is regulated by the rule of distress, a stage coach ready to start, and one which had just arrived but not deposited the passengers at their homes as was customary, were held liable to seizure. *Potter v. Hall*, 3 Pick. 368.

(3) S. P. of goods received on storage by one merchant for another, who was the factor, *Brown v. Sims*, 17 S. & R. 139. Nor a horse sent to a livery stable to be taken care of, *Youngblood v. Lowry*, 2 McCord, 39; nor goods sent to an auction store for sale, *Hineley v. Wyatt*, 1 Bay, 102; nor an apprentice boy. *Phælon v. McBride*, 1 Bay, 170; but the exemption for benefit of trade extends only to strangers; hence goods sent to be filled at the mill of the owner, may be distrained. *Haskins v. Paul*, 4 Halst. 110. But this privilege in favour of trade is confined to transactions within the ordinary business of the party; it does not necessarily result that where a retail grocer received a ceroon of indigo on consignment, it is protected from distress. *Bevan v. Crooks*, 7 W. & S. 302. Replevin is the only remedy for a stranger where notice of the distress has been given to the tenant. *Caldecough v. Hollingsworth*, 8 W. & S. 302.

*23 Eng. Com. Law Reps. 416. ¹29 Id. 51. ⁷ Id. 355. ⁸ Id. 324. ¹² Id. 166.

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For the same reason things at an inn are privileged from distress, more especially as inns are places devoted to the public service;(*f*)(1) but the things must be actually within the premises of the inn to be so privileged, and not removed to some distant place for the convenience of the innkeeper, and therefore a race-horse, in a stable belonging to an innkeeper a mile distant from the inn, was held not exempt from distress;(*f*) so, a livery stable-keeper is not privileged like an innkeeper, and therefore a chariot standing at a livery stable might be distrained.(*g*)

240. Again, goods in the custody of the law are privileged from distress,(2) therefore goods distrained *damage feasant* cannot be distrained for rent.(*h*) So, goods under an attachment cannot be distrained;(i) so, goods taken in execution:(*k*) but when the sheriff has abandoned the possession [235] of the goods after having made the seizure, it was held that *the goods were no longer under the protection of the law, and might be distrained;(l) so, if goods remain on the demised premises after a fictitious sale made under a fraudulent execution, they are liable to the landlord's distress;(m) so, corn in the blade, taken and sold under a *fi. fa.*, afterwards continuing on the premises before any rent was due, might be distrained, as it seems, for rent subsequently due.(n) Sheaves of corn before the 2 W. & M. (see Dig. P. ii. tit. Distress) could not be taken in distress, because such things could not be restored to the owner in the same plight and condition as they were in at the time of taking them.(o)

241. So, things for which replevin will not lie, as things like money in a bag, which cannot be known again;(p) but a bag of money sealed may be distrained, because it may be known again.(q)

So, again, where the estate of a tenant at will is determined either by his own death or by the act of the landlord, the corn sown by him cannot be distrained for rent due from a subsequent tenant;(r) but where by a custom a tenant has left the away-going crop in the barns, the landlord may distrain the same at the expiration of six months after the determination of the term.(s)

c. When Distress may be made.

242. A distress for a rent-service or rent-charge cannot be in the night;(t) and in *Aldenburgh v. Peaple*(u) it was ruled that no one had a right to

(f) *Crosier v. Tomlinson*, 2 Keny. 439; S. C., Barnes, 472.

(g) *Francis v. Wyatt*, 1 Bl. 483; S. C., 3 Burr. 1408.

(h) 1 Inst. 47, a.

(i) *Monk's case*, 1 Vent. 222, arg.

(k) *Eaton v. Southby*, Willes, 136.

(l) *Blades v. Arundale*, 1 M. & S. 711.

(m) *Smith v. Russell*, 3 Taunt. 400.

(n) *Gwillim v. Barker*, 1 Price, 274.

(o) 1 Inst. 47, a.

(p) *Keilw.* 145; 2 Inst. 82; Roll. Abr. 667.

(q) 22 E. 4, 50 b.

(r) *Eaton v. Southby*, Willes, 131.

(s) *Beavan v. Delahay*, 1 H. Bl. 5.

(t) 1 Inst. 142; 7 Co. 7 a. 9 Co. 66 a.

(u) 6 C. & P. 212.^a

(1) *Russel v. Doty*, 4 Cow. 576. *Hamilton v. Reedy*, 3 M'Cord, 40. *Pierce v. Scott*, 4 W. & S. 344.

(2) Or goods of a boarder at a lodging-house. *Riddle v. Whelden*, 5 Whart. 9.

make a distress after dark. *Sed secus* as to distress for *damage feasant*, see post, INJURIES TO THINGS REAL.

*As rent is not due until the last minute of the natural day on which it is payable,(x) it follows, that a distress for rent-arrear can- [*236] not be made on that day.(y)(1)

At the common law, if a lease was made at Michaelmas for a year, reserving rent on the feasts of the Annunciation and St. Michael, the lessor was deprived of his remedy by distress for the rent due at Michaelmas, because he could not distrain at the expiration of the term;(z) but if by the custom of the country or by express stipulation between the parties, the rent be payable on the day on which the tenant enters, the landlord may distrain for it on that day;(a)(2) and so it seems by the usage of a parish, a quarter's rent may be distrained for before the end of the quarter:(b) and by the 8 A. c. 14, s. 6, the landlord may distrain for such arrears within six months after the determination of the term. See Dig. P. ii. tit. Distress, P. iii. tit. Landlord and Tenant. And where by the custom of the country a tenant may leave his away-going crop in the barns, it has been held that the landlord may distrain after six months have expired from the determination of the term;(c) and where the tenant dies before the expiration of the term and his personal representative continues in possession during the remainder of the term, the landlord may distrain within six months after the end of the term for rent due for the whole term;(d) and the statute applies to cases only in which the tenancy has been determined by lapse of time, or perhaps by notice to quit, and not to cases where it has been put an end to by the wrongful disclaimer of the tenant.(e) [*237] *Distresses for the recovery of rent may by the 3 & 4 W. 4, c. 27, s. 2, be made at any time within twenty years next after the time at which the right to make such distress has accrued, and by s. 42 of the same act no arrears of rent can be recovered by distress for more than six years.(f)

d. Place where Distress may be made, or otherwise.

243. The distress must be made upon the land from which the rent issues, and therefore where the exclusive use of the land of the river Thames opposite and in front of a wharf, between high and low water mark, as well when covered with water as dry, for the accommodation of the tenants of the

(x) See ante, s. 194. (y) 4 H. 6, 31; 21 H. 6, 40; and see Harg. Co. Litt. 47, b. n. (6).

(z) 1 Inst. 47, b.; 1 Roll. Abr. 670, pl. 10. (a) Buckley v. Taylor, 2 T. R. 600.

(b) Tracey v. Talbot, 6 Mod. 214. (c) Beavan v. Delahay, 1 H. Bl. 5.

(d) Braithwaite v. Cooksey, 1 H. Bl. 465. See also Boraston v. Green, 16 East, 81; Knight v. Bennett, 3 Bing. 366.

(e) Doe v. Williams, 7 C. & P. 323.^b See farther, Nuttall v. Staunton, 4 B. & C. 51.^c Taylerson v. Peters, 7 Ad. & E. 110;^d S. C., 2 Nev. & P. 622. Also Dig. P. ii. tit. Distress; P. iii. tit. Landlord and Tenant.

(f) Paget v. Foley, 2 Bing. N. C. 679;^e S. C., 3 Scott, 120; 2 Hod. 32. See Dig. P. iii. tit. Limitations.

(1) Garro v. Hart, Hard. (Ky.) 297.

(2) The same principle is recognised in Russell v. Doty, 4 Cow. 576. Peters v. Newkirk, 6 Cow. 107. Williams v. Howard, 3 Munt. 277. Beycr v. Fenstermacher, 2 Whart. 95.

^a13 Eng. Com. Law Reps. 9. ^b32 Id. 525. ^c10 Id. 276. ^d34 Id. 45. ^e29 Id. 457

wharf, was demised as appurtenant to the wharf, but the land itself between high and low water was not demised, it was held that the lessor could not distrain for rent-arrear, barges, the property of the tenant, lying in the space between high and low water mark, and attached to the wharf by ropes. (g)(1)

244. If the lord distrains out of his fee, in land not holden of him, the tenant may make *rescous* unless in special cases; (h) but the queen by her prerogative may distrain upon other land than her own, and is especially excepted by a clause in the Statute of Marlbridge. (i) So, if the lord come to distrain within his fee, and the tenant seeing him, drive the cattle off the land, then the lord may follow the beasts and distrain them out of the premises, if he had once a view of the cattle on his land; (j) but if the lord had no view of the cattle within his fee, though the tenant drive them off purposely, or if the cattle of themselves after the view go off the land, or if [238] the tenant after the view remove *them for any other cause than to prevent the lord's distress, then the lord cannot distrain them; (k) but now by the 11 G. 2, c. 19, the landlord is empowered in case of fraudulent removal of goods, to distrain them, wherever found; the removal however, to bring the case within the statute, must take place after the rent becomes due, and must be secret, not made in open day; (l)(2) and the statute applies to the goods of the tenant only and not to the goods of a stranger, (m)(3) or a lodger. (n)

The queen's highway was also by the ancient common law considered as a place privileged from distress, and this is affirmed by the Statute of Marlbridge.

245. A distress for a rent-service may be taken in any part of the land holden, or for a rent charged or reserved upon a lease upon any part of the land out of which the rent issues, and if a house be upon the land demised or charged, a distress may be taken in the house, if the outer door be open; (o) and although the outer door can in no case be broken open, yet the person

(g) *Capel v. Buszard*, 6 Bing. 150;^b S. C., 3 M. & P. 480; 2 Man. & Ryl. 197; 3 Y. & J. 344; overruling S. C., 4 Bing. 137;^c 12 J. B. Moore, 339; 2 C. & P. 541.

(h) 1 Inst. 161, a.

(i) 2 Inst. 132.

(j) 1 Inst. 161, a.

(k) 1 Inst. 161, a.

(l) *Watson v. Main*, 3 Esp. 15; *Rand v. Vaughan*, 1 Bing. N. C. 767.^d

(m) *Thornson v. Adams*, 5 M. & S. 38.

(n) *Postman v. Harrell*, 6 C. & P. 225.^e See also *Bach v. Meats*, 5 M. & S. 200; *Brooke v. Noakes*, 8 B. & C. 537;^f *Bromley v. Holden*, 1 Moo. & M. 175;^g and Dig. P. iii. tit. Landlord and Tenant.

(o) 1 Roll. Abr. 671; Com. Dig. tit. Distress (A. 3).

(1) *Pemberton v. Van Rensselaer*, 1 Wend. 309.

(2) This statute remedying the defect in the common law, has been re-enacted in many States. The rule, that the removal must have been after the rent became due, under the Pennsylvania act of 1782, was recognised in *Graec v. Shively*, 12 Serg. & Rawle, 217. This has been remedied by the act of 1825, and it is immaterial when the goods were removed, provided it was fraudulent as to the landlord. The former rule prevails in S. C., *Brown v. Duncan*, 1 Harp. 337. The New York statute is said to extend the remedy further than the English statute. 3 Kent Com. 481. *Reynolds v. Shuler*, 5 Cow. 323.

(3) *Adams v. La Comb*, 1 Dall. 440.

^b Eng. Com. Law. Reps. xxix. 36. ^c Id. xiii. 377. ^d Id. xxvii. 568. ^e Id. xxv. 369.

^f Id. xv. 289. ^g Id. xxii. 282.

distraining may justify breaking open an inner door or lock to find any goods which are distrainable ;(*p*) so, gates or inclosures cannot be broken open or thrown down to take a distress ;(*q*) except now under the 11 G. 2, c. 19, s. 7, in the case of a fraudulent removal of goods, see Dig. D. iii. tit. Landlord and Tenant. So, where a person taking a distress has been violently ejected, he may justify breaking open the door in order to complete the taking ;(*r*) and where a landlord, who occupied *an apartment over a mill demised to his tenant, from which it was separated only by a boarded [*239] floor without any ceiling, took up the floor and entered through the aperture to distrain for the rent, held that he was no trespasser ; and where a man can get in without a trespass he may lawfully distrain.(*s*)

If the demises are several there must be separate distresses upon the several premises subject to each distinct rent ; for no distress on one part can be good for both rents, although the several premises are demised to the same tenant ;(*t*) but if a rent-charge issue out of land in the possession of several tenants, a distress may be taken upon the possession of one for the whole rent, for it issues out of each part ;(*u*) so, where lands, lying in different counties, are held under one demise at an entire rent, the rent may be lawfully taken in either county for the whole rent in arrear.(*x*)

e. Manner of making a Distress, and the Proceedings thereon.

246. The distress may be made by the landlord himself, or by his authorized agent or bailiff,(1) in the former case if the landlord come into the house, and seize upon any article as a distress in the name of all the goods in the house, it will be a good seizure of all ;(*y*) and any declaration on the part of the landlord will be sufficient to commence a distress, as where he declared on the premises "that nothing shall be removed until my rent is paid," it was held, that in consequence of such declaration the landlord had a right to take and bring back an article which had been removed ;(*z*) so, where a broker went to the tenant's house, and pressed for payment [*240] of rent alleged to be due and a sum for the *expenses of the levy, but touched nothing and made no inventory, and the tenant then paid the rent and expenses under protest, it was held, in an action against the landlord for an excessive distress, he could not say there had been no distress ;(*a*) so, where the landlord's agent went upon the premises and gave a written notice that he had distrained certain goods, and unless the rent was paid or the goods replevied, that they would be sold in five days ; this was held to

(*p*) *Brown v. Dean*, Bull. N. P. 881 ; *Browning v. Dann*, Ca. temp. Hardw. 163.

(*q*) 1 Inst. 161, a.

(*r*) Woodf. L. & T. 329, 4th ed., by Harr. & Woll.

(*s*) *Gould v. Bradstock*, 4 Taunt. 562.

(*t*) *Rogers v. Berkmir* Ca. temp. Hardw. 245 ; S. C., 2 Str. 1040.

(*u*) 1 Roll. Abr. 671.

(*x*) *Walter v. Rumball*, 1 Ld. Raym. 55 ; S. C., 12 Mod. 76 ; 1 Salk. 247.

(*y*) *Dodd v. Monger or Morgan*, 6 Mod. 215 ; S. C., Holt, 416.

(*z*) *Wood v. Nunn*, 5 Bing. 10,^b 2 M. & P. 27.

(*a*) *Hutchins v. Scott*, 2 M. & W. 809 ; S. C., Murr. & Hurl. 194.

(1) In the name of the landlord. *Swearingen v. McGruder*, 4 Har. & McH. 347.

^bEng. Com. Law Reps. xv. 346.

be a sufficient seizure, although he had left no one in possession ;(b) but where a broker's man left the premises, of which he had possession, it was held, that the landlord had no right six days after to break into the house and take the goods away.(c)

A landlord is *primâ facie* liable for the act of the bailiff if he conduct the distress irregularly, unless he repudiates the act as soon as he is made acquainted with it ;(d) and to justify the landlord in calling in the aid of a police officer, he must shew that he had reason to apprehend violence.(e)

247. Where the bailiff distrains he must do so under a written authority(1) signed by the landlord, which is termed a *warrant of distress*, (for the form of which see 2 Prec. in Conv. tit. Distress, p. 302) ; and in the case of coparceners this must be signed by all :(f) but one of several joint-tenants may sign a warrant of distress, and appoint a bailiff to distrain for rent due to all, if the others do not interfere ;(g) but where a change has been made in the name of the person appointed to distrain it will not render the warrant void if it appears to have been done with the concurrence of the landlord ;(h) so, a man may distrain without *any express authority [241] previously given, provided he afterwards obtains the assent of the landlord to what he has done ;(i) and a subsequent agreement to a distress, given by the landlord to the person making it, is as much an authority, as if he had previously appointed him bailiff to distrain ;(k) and when in replevin it is proved that the landlord employs the attorney to defend the broker, that is sufficient evidence of the broker's authority to distrain in the absence of any warrant.(l)

248. At common law a man might have driven a distress whither he pleased,(m) but this evil was remedied first by the Statute of Marlbridge prohibiting a distress to be driven out of the county ; afterwards, still further, by the 1 & 2 P. & M. c. 112 ; 11 G. 2, c. 19, s. 8 ; and 5 & 6 W. 4, c. 59, see Dig. P. ii. tit. Distress ;(2) yet if the tenancy is in one county and the manor in another, the lord may drive the distress taken in the tenancy into the manor in the other county ;(n) ; so, where the lands are held under one demise, at one entire rent, a distress may be lawfully taken in either county, and chasing a distress over, where the counties adjoin, is

(b) *Swann v. Falmouth (Earl)*, 8 B. & C. 456 ; 1 S. C., 2 Man. & Ryl. 534.

(c) *Russell v. Rider*, 6 C. & P. 416.^k (d) *Hurry v. Rickman*, 1 Moo. & Rob. 126.

(e) *Skidmore v. Booth*, 6 C. & P. 777.^l (f) *Buller's case*, 1 Leon. 64.

(g) *Robinson v. Hoffman*, 4 Bing. 562 ;^m 1 S. C., 1 M. & P. 474 ; 3 C. & P. 234.

(h) *Toplis v. Grane*, 5 Bing. N. C. 636 ;ⁿ 1 S. C., 7 Scott, 620.

(i) *Gilb. Distr.* 32.

(k) *Bro. Abr. tit. Traversc*, 3 ; *Lamb v. Mills*, 4 Mod. 378 ; *Trevillian v. Pine*, 11 Mod. 112.

(l) *Duncan v. Meicleham*, 3 C. & P. 172.^o

(m) 2 Inst. 106.

(n) *Keilw.* 50 ; *Bro. Distress*, 33.

(1) This is not required in Pennsylvania. *Franciscus v. Reigart*, 4 W. 98. *Jones v. Gundrim*, 3 W. & S. 531.

(2) He may impound on the premises. *Woglam v. Cowperthwait*, 2 Dall. 68. *McKinney v. Recder*, 6 W. 34.

^kEng. Com. Law Repts. xv. 264. ^lId. xxv. 463. ^mId. xxv. 646. ⁿId. xv. 73.

^oId. xxxv. 256. ^pId. xiv. 257.

a continuance of the taking ;(*o*) if the hundred in which the cattle were distrained be in one county, and the hundred into which they were driven be in another, the venue may be laid in either county. (*p*)

By the 1 & 2 Ph. & M. c. 12, no cattle can be driven out of the hundred, &c., except to a pound overt in the same shire, and the 5 & 6 W. 4, c. 59, makes it obligatory on the distrainer to provide food for impounded animals, and authorizes him to recover his expenses ;(*q*) and under this act it has been held that distrainers are bound to see that the pound to which they take the distress is in a fit *state to receive it ; and it is no defence for abusing the distress by putting the animals in a muddy pound, [*242] that the place was the manor pound. (*r*)

249. At the common law distresses for rent-arrear could not be sold, but only detained as pledges for enforcing the payment of such rent ; but the 2 W. & M. sess. 1, c. 5, s. 2, provides that at the expiration of five days after notice of distress to the tenant, and no replevy of the same, the distrainer may cause the same to be appraised and sold. (1) Under this Act it has been held, that five times twenty-four hours must elapse before the sale ;(*s*) so, the five days are reckoned inclusive of the day of sale. (*t*) (2) and a reasonable time after the expiration of the five days is allowed to the landlord for appraising and selling the goods ;(*u*) but if they remain longer, without the tenant's consent, distrainer will be deemed a trespasser ;(*x*) so, if the goods be not sold after the five days, the tenant may replevy them, for at common law the distress was at all times replevisable. (*y*) On other points of construction of this and the other statutes relating to distresses, see Dig. P. ii. tit. Distress ; and as to the forms of notices, and other forms of proceeding in distresses, see 2 Prec. in Conv. tit. Distress ; and as to pound-breach and rescous, and also as to unlawful and irregular distresses, see post, INJURIES TO THINGS REAL AND THEIR REMEDIES.

250. On the same principle that distresses were pledges, the distrainer was not and still is not at liberty to deal with a distress as his own, therefore he cannot make use of the distress, as to work a horse and the like, and it was even thought that he could not do anything for the owner's benefit, as to milk a cow, without his consent ;(*z*) but this was never settled as law ;(*a*) yet it has been held, that *where a man distrained barrels of beer, and drew beer out of one of them, he was a trespasser *ab initio* as to that barrel only. (*b*)

(*o*) *Walter v. Rumball*, 1 Ld. Raym. 55 ; S. C., 12 Mod. 76 ; 1 Salk. 247.

(*p*) *Pope v. Davis*, 2 Taunt. 252. (*q*) See Dig. sup.

(*r*) *Wilder v. Speer*, 8 Ad. & E. 547 ; S. C., 3 Nev. & P. 536.

(*s*) *Harper v. Tasswell*, 6 C. & P. 166.

(*t*) *Wallace v. King*, 1 H. Bl. 13.

(*u*) *Pitt v. Shew*, 4 B. & A. 208.

(*x*) *Griffin v. Seott*, 2 Str. 717 ; S. C., 2 Ld. Raym. 1424.

(*y*) *Jacob v. King*, 5 Taunt. 451. (*z*) 1 Vent. 37. (*a*) *Cro. El.* 733. (*b*) 6 Mod. 216.

(1) The sale cannot be made without this notice or he will be a trespasser *ab initio*. *Kerr v. Sharp*, 14 S. & R. 402.

(2) In Pennsylvania it is reckoned exclusive of the day of distress ; and if Sunday be the last of the five days it is not to be counted. *McKinley v. Reader*, 6 W. 37.

†35 Eng. Com. Law Reps. 450. †25 Id. 336. †6 Id. 403. †1 Id. 154.

So, if a man distrains dead goods, as utensils of a house or such like, which may take damage by wet or weather and the like, he ought to impound them in a house or other pound covert within the proper distance, as prescribed by the 1 & 2 Ph. & M.;(c) for if he impounded them in a pound overt he ought to answer for them.(d) If a man distrains cattle and puts them in a pound overt, it was said the owner ought to keep them at his peril, for it was lawful for him to come there for this purpose; but if put in a pound covert or close, there the distrainer ought to keep them at his peril, and yet he should not have any satisfaction for it.(e)

II. Remedy by Entry.

251. At common law there was a material difference between the remedy by distress, and the remedy by re-entry, for in the case of distress for non-payment of rent, no previous demand of the rent in arrear was necessary; but where the remedy was by re-entry, there must have been an actual demand made previous to the entry, and all the formalities in making the demand as to time, place, amount of rent and other particulars, must have been strictly observed;(f)(1) unless by consent of the parties the previous demand was dispensed with, for by "special consent of the parties re-entry may be for default of payment of rent without demand of it;"(g) and a proviso in a deed for re-entry for non-payment of rent, "although no demand thereof should be lawfully made," has been held in more than one case to dispense with any demand at all;(h) and this clause is commonly inserted in leases and annuity deeds.

*In order to obviate the difficulties which attended making such [*244] demand, it is provided by the 4 G. 2, c. 28,(2) that where one half year's rent is in arrear, and the landlord has right by law to re-enter for non-payment, he may without any formal demand or re-entry serve a declaration in ejectment;(i) but the statute dispenses with the demand of the rent in those cases only where there is not sufficient distress, as well as six months' rent in arrear, it is therefore still necessary for the lessor to comply with all the formalities of the common law, before he can proceed on a clause of re-entry for non-payment of rent, if a sufficient distress can be found;(k) but an insertion in the proviso of the lease, that the

(c) See Dig. sup.

(d) 1 Inst. 147.

(e) Ib.

(f) 1 Saund. 287, n. (16).

(g) Dormer's case, 5 Co. 40; see also Dy. 68.

(h) Goodright v. Cator, 2 Dougl. 477; recognized in Doe v. Masters, 2 B & C. 490.

(i) See Dig. P. iii. tit. Landlord and Tenant. (k) Doe v. Wandlass, 7 T. R. 117.

(1) Wartenby v. Moran, 3 Call, 424. Newman v. Rutter, 8 W. 51. It passes to an assignee of a rent-charge. Farley v. Craig, 6 Halst. 270. And the forfeiture is waived after entry by the same conduct as would have that effect before entry. Coon v. Brickett, 2 New Hamp. 164. The demand must be on the day, even though the possession be vacant. M'Murphy v. Minon, 4 N. H. 254. Remsen v. Conklin, 18 Johns. 450. And entries cannot be presumed to have been made when the entry was made in another right. Ritchie v. Putman, 13 Wend. 524. And even in the case of a rent-service there must be a right of re-entry reserved to entitle the landlord to bring ejectment. Kenege v. Elliott, 9 W. 258.

(2) This stat. has never been extended to Pennsylvania, and the common law still governs cases of this kind. Hence a demand on the premises is essential even though the premises be a vacant lot and no one on the land to pay it. McCormick v. Connell, 6 S. & R. 151.

right of re-entry shall accrue upon the rent being "lawfully demanded," will not since this statute make a demand necessary, if there be no sufficient distress;(l) and if a landlord is prevented by a tenant from entering, he may recover under the statute without shewing that there was actually no sufficient distress.(m)

252. The same formalities are required in recovering a *nomine pænæ* (n) which is not considered so much a remedy for the recovery of rent, as a penalty to oblige the tenant to a punctual payment; and this as well of a rent-charge as a rent-service,(o) and it seems that there must be a demand as well of the penalty as of the rent,(p) therefore if it be granted, that, if the rent be in arrear, the tenant shall forfeit 8s. a-day as a *nomine pænæ*, there must be an actual demand of the rent at the day to give a title to the penalty, because, until demand made, it cannot appear that there was any default;(p) and if a lessor avows for rent and a *nomine pænæ*, and the rent was not demanded, so that the *nomine pænæ* *was not due, a general judgment for both shall be entirely reversed.(q) [*245]

III. Remedy by Action.(1)

253. The remedy by action may be either by action of debt, or action for use and occupation, besides the remedy given to landlords by statute in case of execution.(r)

At common law the remedy by action of debt extended only to rents reserved on leases for years, but did not affect freehold rents,(s) therefore it does not lie for the arrears of a rent in fee, in tail or for life, so long as the estate of freehold had continuance;(t) so, if a lessee for life of a rent acknowledged a statute, and afterwards leased to the terre-tenant, and then the conusee extended, the latter should not have debt for the rent, though his interest was but a chattel; for as to him the freehold, out of which it was derived had continuance;(u) so it was in case of a rent-charge, for if a man were seised of it in fee, and it was in arrear, he could have no action of debt for the arrears.(x) But this rule in respect of a rent-service extended only to arrears incurred during the continuance of the life; for if lessee for life died, the lessor might have an action of debt for the arrears, because the land was no longer a security for the rent;(y) in the case however of a rent-charge it appears that there was not the same remedy, for if a man seised of a rent-charge in fee died, neither his heir nor executors could have an action for the recovery of such arrears: but now by 8 A. c. 14, s. 4, this defect

(l) Doe v. Alexander, 2 M. & S. 525.

(m) Doe v. Dyson, Moo. & M. 77; and see 15 East, 286.

(n) See ante, § 155. (o) Palm. 206; 2 Lutw. 1151.

(p) Maud's case, 7 Co. 28; Hob. 82. 208; Brownl. 171. (q) 1 Ld. Raym. 256.

(r) See ante, s. 199. (s) 1 Inst. 162.

(t) 8 H. 6, 6 b.; 1 Roll. Abr. 594, C. 55. (u) 1 Roll. Abr. 596.

(x) 1 Inst. 162; 4 Co. 49. (y) 1 Inst. 162.

(1) Account render will lie where the rent is uncertain, as for two-thirds of the tolls of a mill. Long v. Fitzsimmons, 1 W. & S. 530.

22 Eng. Com. Law Reps. 256.

in the law is supplied by giving the tenant for life the same remedy for any arrears of rent during the continuance of his estate, as the lessee for years enjoyed at common law ; but this statute applies only to the case of rent due from a tenant to a landlord, and does not extend to an annuity or yearly rent [*246] devised to A. and payable during the *life of B. out of the lands devised by the same will to B., and therefore during the continuance of the estate of freehold in the rent, an action of debt does not lie by A. against B. for the arrears.(z)

245. By the 32 H. 8, c. 37, the personal representatives of a man seised of a rent-service, rent-charge or rent-seck, either in fee simple or fee tail, or for term of lives, have now a double remedy given them for arrears of rent, either by action of debt or by distress ; the action of debt lies not only against the tenant that ought to have paid the rent, but against his executors and administrators, and the distress runs with the land as long as it continues in the tenant's possession that suffered the rent to run in arrear, or any other person claiming by or from him ;(a) and the statute has been held to extend as well to the executors of tenant for his own life, as to executors of tenant *pur autre vie* ;(b) although this enlarged construction was not at first admitted : (c) it seems also doubtful whether this statute extends to cases of arrears due on leases for years, since the statute specifies only tenants in fee simple, fee tail, and for lives, of rents, &c.(d) See further on the construction of that statute Dig. P. ii. Executors.

At common law if there had been tenant for life of a rent and he died, the rent being in arrear, his personal representatives had an action of debt for the arrears ;(e) but if before the 11 G. 2, c. 19, s. 15, and the 4 & 5 W. 4, c. 22, they had no remedy to recover any portion of rent accruing due in the interval of the quarter. See Dig. P. ii. tit. Apportionment ; also ante, § 210, et seq.

255. By the 4 G. 2, c. 28, any tenant for life or years, *or person [*247] coming into possession of lands by collusion with the tenant, and holding over after determination of the term, and after demand and notice for delivering possession, is made liable to pay double the yearly value of the land, for the recovery of which an action of debt is given ; but it has been held that a person holding over under a fair claim of right is not within this act, although it be decided eventually that he has no right ;(f) but although according to the order of the words in the act it should seem that the notice ought to be given after the determination of the term, yet if given before it has been held sufficient,(g) the law being remedial in favour of landlords ;(h) and on this ground it was held, that when a woman had received notice to quit, and before the expiration of the tenancy married, it was not necessary to make a demand upon the husband in order to entitle

(z) Webb v. Jiggs, 4 M. & S. 113.

(a) 1 Inst. 162 ; 4 Co. 48. 50.

(b) Hool v. Bell, Ld. Raym. 172.

(c) 1 Inst. 162 ; Turner v. Lee, Cro. Car. 471 ; see also Cro. El. 332.

(d) Mireton v. Gilbee, 2 J. B. Moore, 48. S. C. 8 Taunt. 159.

(e) 1 Inst. 62

(f) Wright v. Smith, 5 Esp. 203.

(g) Cutting v. Derby, 1 Bl. 1075.

(h) Wilkinson v. Colley, 5 Burr. 2634.

the landlord to recover the double value.⁽ⁱ⁾ But this statute has also been considered penal, and therefore that it ought to be construed strictly, and cannot be construed to extend to a tenant from week to week.^(k)

Where the demise is for a time certain, as for one year, and no longer, a notice to quit is not necessary at the expiration of the year, to put an end to the tenancy; but a demand of possession is necessary to entitle the landlord to double value, and the demand may be made after the determination of the term, but the landlord will be entitled to double value only from the time of the notice and demand.^(l) See further on the construction of this statute, Dig. P. ii. tit. Ejectment.

256. By the 11 G. 2, c. 19, s. 18, it is provided that when a tenant after having given notice to quit holds over, he shall be liable to pay double rent, which may be *recovered in the same manner as single rent, that is by distress, which is one point of distinction between the provision [^{*248}] in this statute and that for the double value in 4 Geo. 2;^(m) so, a tenant by parol demise from year to year is within this statute and liable to pay double rent on holding over;⁽ⁿ⁾ so, if he gives parol notice;⁽ⁿ⁾ so, there must be some fixed time specified in the tenant's notice to quit, a notice that a tenant will quit as soon as he can get another situation, is not sufficient to render him liable for double rent;^(o) and the notice must be such a one as would be binding on the tenant, so that the landlord might maintain ejectment.^(o)

Under the 4 G. 2, an action may be supported after a recovery of the premises in ejectment, there being no incongruity in bringing the two actions, for the action of ejectment is to recover the possession, and the action for double value is to indemnify the landlord for the wrong in holding over;^(p) but it is otherwise in the case of a claim for double rent under the 11 G. 2, for this statute gives the landlord a right to distrain for it, which is a special remedy applicable only to the relation of the landlord: upon this statute therefore there would be an incongruity in applying the remedy for double rent after an action of ejectment which treats the person in possession as a trespasser.^(q) See further on the construction of this statute, Dig. P. ii. tit. Ejectment; and on the action of debt for the recovery of rent, see post, § 253.

257. Before the 11 G. 2, c. 19, s. 14, which gives the landlord an action on the case for use and occupation as a reasonable satisfaction for the lands, tenements or hereditaments held by the tenant, an action of *assumpsit* would lie on a promise to pay a sum of money in consideration of a *per- [^{*249}] mission to occupy lands;^(r) but as this is a real contract for which *assumpsit* will not lie, this difficulty was got rid of by considering the sum to be paid as a compensation due on the contract and not as rent, and the

(i) Lake v. Smith, 1 N. R. 176.

(k) Lloyd v. Rosbee, 2 Camp. 453; See also Sullivan v. Bishop, 2 C. & P. 359.^w

(l) Cobb v. Stokes, 8 East, 458.

(m) Timmins v. Rawlinson, 3 Burr. 1603

(n) Farrance v. Elkington, 2 Camp. 591.

(o) Johnstone v. Huddleston, 4 B. & C. 922.^x

(p) Soulsby v. Neving, 9 East, 310; See also Ryall v. Rich, 10 East, 48.

(q) Soulsby v. Neving, sup.

(r) Dartnall v. Morgan, Cro. Jac. 598; Chapman v. Southwicke, 1 Lev. 204.

^w12 Eng. Com. Law Reps. 170. ^x10 Id. 471.

permission to occupy as not amounting to a demise; for a plaintiff would have been nonsuited, if he produced in evidence in such action any parol demise or agreement with a reservation of rent.(s) Under this statute the landlord who has rent owing to him is allowed to recover, not the rent but an equivalent for the rent; and if the demise be produced against him, it shall not defeat this action as it would have done before the statute.(t)(1)

Regularly this action lies where there is no demise or agreement under seal;(2) but in one case where a defendant held under an agreement which did not amount to a demise, it was decided that the action for use and occupation was maintainable, although the agreement was by deed; where there has been an actual occupation, the action lies in respect of an incorporeal hereditament;(u) so, where there had been occupation under an agreement to take a lease of certain minerals, it was held not to be a mere license, but a right constituting an hereditament within the 11 G. 2;(x) so, where a lease for years expired at Midsummer and the tenant refused to give up possession, insisting that he was entitled to have notice to quit, and afterwards continued in possession until Christmas, and paid rent to that time, when he tendered the keys of the premises to the landlord, which the latter refused to take; this was adjudged not to be a holding over, but conclusive evidence of a tenancy from year to year, which enabled the landlord to maintain use and occupation for a quarter's rent due at Lady-Day;(y) [*250] *so, rent may be recovered in this action, notwithstanding the building has been burnt down;(z) so, the landlord may support this action against the original tenant, although the premises are in the occupation of an under-tenant;(a) but if lands are let to A., and B. agree with the landlord to stand in A's place and pay rent, the landlord may afterwards sue B. for use and occupation, and B. cannot set up A.'s title as a defence to the

(s) 5 Taunt. 25.¹

(t) Naish v. Tatlock, 2 H. Bl. 323.

(u) Bird v. Higginson, 2 Ad. & Ell. 696;² S. C., 4 Nev. & Man. 505; 1 Har. & W. 61.

(x) Jones v. Reynolds, 4 Ad. & Ell. 805;³ S. C., 6 Nev. & M. 441; 7 C. & P. 335.

(y) Bishop v. Howard, 2 B. & C. 100.⁴

(z) Baker v. Holzapfel, 4 Taunt. 45; see also Izon v. Gorton, 5 Bing. N. C. 501;⁵ Packer v. Gibbins, 1 G. & D. 10.

(a) Bull v. Sibb, 8 T. R. 327.

(1) It has been held that this action is at common law, independently of the stat. of Geo. 2, without an express promise. *Gunn v. Scovill*, 4 Day, 228. *Eppes v. Cole*, 4 Hen. & Mun. 161. *Roberts v. Tennell*, 3 Munr. 253. *Crouch v. Brilles*, 7 J. J. Marsh. 257. In New York a statute similar in effect has been enacted, prior to which the action could not be maintained, except on an express promise. *Featherstonhaugh v. Bradshaw*, 1 Wend. 135. In Pennsylvania, the 14th and 15th sections of the statute are in force: and the same point ruled in *Pott v. Leshar*, 1 Yeat. 578. It is immaterial that the premises be actually used by the tenant if he had a right and an opportunity of doing so. *Grant v. Gill*, 2 Whart. 42. *Hemphill v. Flynn*, 2 Barr, 144. *Little v. Martin* 3 Wend. 219. And a written contract not under seal may be given in evidence, and the price stipulated cannot be disputed. *Williams v. Sheridan*, 7 Wend. 109.

(2) It will not lie where there has been a demise by deed, even on an express assumpsit. *Codman v. Jenkins*, 14 Mass. 93—97; nor against an assignee of such lessee, *Blume v. McClurken*, 10 W. 380; nor against members of a partnership where the demise was by deed to one partner. *Brook v. Evans*, 5 W. 196. But if a tenant enter under an agreement to take a lease under seal and then refuse to accept, the action lies. *Little v. Martin*, 3 Wend. 219.

¹ Eng. Com. Law Reps. 6. ² 29 Id. 177. ³ 31 Id. 184. ⁴ 9 Id. 41. ⁵ 35 Id. 138.

action; (b) so, this action will lie where a party has continued in possession after the expiration of his term; (c) (1) unless there be a new agreement by the landlord to accept another person as tenant in his stead, (c) (2) and if the premises are in the possession of an under-tenant, the landlord may refuse to accept the possession, and hold the original lessee liable; (d) so, before the 6 G. 4, c. 16, this action lay against a tenant notwithstanding his bankruptcy. (e)

258. As to the cases to which this action does not apply, if a landlord accept of an under-tenant and distrain upon him for rent, he cannot afterwards proceed for use and occupation against the original tenant; (f) so, where lands have been let to one who underlets to others, and the latter receive notice to quit from the original landlord and one does in consequence quit, and the lands occupied by him remain unlet for a year, and are then let by the original tenant, the original landlord cannot recover in use and occupation for the rents of the unoccupied premises, as such circumstances amount to an eviction; (g) (3) so, if the tenant, with the landlord's consent, quit in the middle of a quarter, the landlord *cannot recover for the whole quarter, nor *pro rata* for that part of it during which the [*251] occupation continued. (h)

So, although executors and administrators cannot as a rule reject the term of their testator or intestate, yet where an administrator has merely taken possession of the premises and tried to let, but has made no profit of them, he cannot be charged for use and occupation; (i) so, this action is not maintainable against a husband alone, if his wife held under a yearly tenancy before marriage, the rent being payable half-yearly, where part of such rent was due from the wife *dum sola*, and the remainder accrued after the coverture; (k) so, this action will not lie, where the title is in dispute, for the Courts will not try title by such an action. (l)

This action is founded on contract and does not apply to an adverse or tortious holding; (4) therefore the plaintiff, after recovery in ejectment of

(b) Phipps v. Sealthorpe, 1 B. & A. 59; see also Matthews v. Sawell, 8 Taunt. 270; ^f Ibbs v. Richardson, 9 Ad. & Ell. 849.

(c) Christy v. Tancred, 7 M. & W. 127.

(d) Harding v. Crethorne, 1 Esp. 57.

(e) Boot v. Wilson, 8 East, 311.

(f) Thomas v. Cook, 2 B. & A. 119.

(g) Burn v. Phelps, 1 Stark. 94.

(h) Grimman v. Legge, 8 B. & C. 324.^h

(i) Remnant v. Bremridge, 2 J. B. Moore, 94. S. C. 8 Taunt. 191.ⁱ

(k) Richardson v. Hall, 3 J. B. Moore, 307; S. C., 1 B. & B. 50. 8 Taunt. 45.^k

(l) Anon., Woodf. L. & Ten. 637, 4th ed. by Har. & W.

(1) Abcecl v. Radcliff, 13 Johns. 297; 15 Id. 507.

(2) But the party remains liable on his covenant; debt however will not lie. Fletcher v. M'Farlane, 12 Mass. 46.

(3) A notice to quit by a purchaser at sheriff's sale of the landlord's estate is a rescission of the lease, a new contract must be proved; mere retention of possession is insufficient. Hemphill v. Tevis, 4 W. & S. 535.

(4) Because that would be to determine a title to land in an action of assumpsit. Boston v. Binney, 11 Pick. 9. There must either be an express promise, which is evidence of a tenancy, to which case the action is confined, or an entry by the consent of the landlord, from which a tenancy is implied. An entry under a contract for purchase will not authorise such an implied promise. Pote v. Leshner, 1 Yeat. 578; Henwood v. Cheesman, 3 S. & R. 500; Bancroft v. Wardell, 13 Johns. 483. Nor can it be sustained by an heir or administrator where a lease had been made without authority by a former administrator. Boyd v. Sloan, 2 Bailey, 311.

^h Eng. Com. Law. Rep. 101. ⁱ 36 Id. 301. ^k 15 Id. 229. ^l 4 Id. 66. ^l 4 Id. 14.

the premises, may recover in this action the rent up to the time of the demise in the ejectment, but not subsequently; (*m*) so, the holding must be under a contract of demise, therefore where a party was let into possession under a contract to purchase and the vendor failed to make a title, it was held that the vendor could not recover for use and occupation. (*n*)

The remedy in this action is not co-extensive with the action of debt for rent; the statute only furnishes an easy remedy in cases of actual occupation, leaving other more complicated cases to their ordinary remedy. (*o*) Debt also lies for use and occupation, and is frequently substituted for the old action of debt for rent. This action of debt however is independent of the statute. (*p*)

[*252] *This action will not lie for the use of premises let for immoral purposes; (*q*) but it will lie for the rent of a Jewish synagogue, there being no express law prohibiting such an establishment. (*r*)

SECTION V.

ANNUITIES OR RENT CHARGES.

§ 259. An annuity, properly so called, is a yearly sum of money granted to another in fee-simple, fee-tail, for life or years, charging the person of the grantor only. (*1*) Where however it is made payable out of lands, and the land is charged, as it usually is, with distress for payment of the same, it is called a *rent-charge*; but if both the person and estate be made liable, as they most commonly are, then it is generally called an *annuity*. (*s*) (*1*)

A corody or pension was an allowance or a right belonging to the crown to receive from the bishops a maintenance for his chaplains until they obtained a benefice, a right the exercise of which as it appears has fallen into disuse. (*t*) A corody so far savoured of the realty that a house or land might be appendant to it. (*u*)

The subject of annuities embraces the following matters entitled to notice:

1. How an annuity is granted or created; 2. The estates in an annuity and the incidents thereto; 3. Apportionment of an annuity; 4. Recovery of an annuity.

(*m*) Buck v. Wright, 1 T. R. 378.

(*n*) Kirtland v. Pounsett, 2 Taunt. 145; but see contra, Howard v. Shaw, 8 M. & W. 118, and other cases, Dig. P. iii. tit. Landlord and Tenant.

(*o*) Naish v. Tatlock, 2 H. Bl. 319. (*p*) Stroud v. Rogers, 6 T. R. 62.

(*q*) Girardy v. Richardson, 1 Esp. 13; Crisp v. Churchill, 1 B. & P. 340.

(*r*) Israel v. Simmons, 2 Stark. 356.¹

(*s*) Doct. & Stud. Dial. 2, 230; 1 Inst. 144, b.; Finch, 161; Roll. Abr. 226.

(*t*) Harg. Co. Litt. 97, a. n. (33.)

(*u*) 1 Inst. 49, a.

(1) Horton v. Cook, 10 W. 127, and to discharge the person a clear intent must appear on the face of the instrument; "to be paid, had, and issuing out of the following description of property" is not sufficient. Id.

***I. How an Annuity may be granted or created. [*253]**

§ 260. By what Conveyances.

261. Where Annuity is not Rent.

§ 262. Annuities under the 53 G. 3, c. 141.

§ 260. Where an annuity is made chargeable upon the lands of the grantor, it may be made, as a rent-charge, by bargain and sale, release, or any other conveyance now in use (see ante, § 159, as to how a rent-charge generally may be created;) but if a man grants an annuity to another, and does not say for him and his heirs, this is determined by the death of the grantor;(x) *sed secus* of the grant of rent out of land, or a grant of a rent whereof a man is seised, because this charges the land and an annuity charges the person only, and cannot be limited to the heir except by express words.(y)

261. In some cases where the grant of a rent is void as rent, yet it may be good as an annuity; as, if a rent be granted to be received out of an acre of land in A. and the grantor has no lands in A. yet this is a good annuity;(z) so, if a man grants a rent of 20*l.* to be received out of a rent of 40*l.* this though not good as a rent, because a rent cannot issue out of a rent, yet is good as an annuity.(a)

262. By the last annuity act, 53 G. 3, c. 141, s. 10, annuities or rent-charges given by will or marriage-settlement, or for the advancement of a child, and also such as are secured upon freehold, or copyhold, or customary lands in Great Britain or Ireland, or in any of Her Majesty's possessions beyond the seas, of equal or greater value than the annuity, over and *above any other annuity, are excluded from the provisions of that [*254] act, the object of which is to impose restrictions on the granting of annuities in consideration of loans of money. See further Dig. P. ii. tit. Annuities.

II. Estate in an Annuity, and Incidents thereto.

§ 262. Annuity in Fee.

How not entailable.

Granted by the Crown in Fee.

No Curtesy or Dower.

§ 263. How far an Hereditament.

Passes by Grant.

Is not Assets.

Is assignable.

§ 263. An annuity may be granted in fee, that is, as a conditional or qualified fee, but it cannot be entailed, being in point of charge strictly personal;(b) therefore a remainder cannot be limited over of it, as it may of a

(x) 2 H. 4; Fitzh. Ann. pl. 16.

(y) Br. Charge, pl. 54; Vin. Abr. Annuity (B.)

(z) 9 H. 6. 13. 63; 1 Inst. 146; Newton v. Weeks, All. 79.

(a) Br. Annuity, pl. 3, citing 9 H. 6. 12; Keilw. 161 b, pl. 1. (b) 1 Inst. 20, a.

rent-charge.(c) except in a grant by the queen;(d) but when granted to one and the heirs of his body, if the condition is performed by the grantee's having issue, the estate becomes absolute in him, and alienable without restriction; and this it seems, though the grantee never come into actual possession.(e)

An annuity in fee granted by the Crown out of the $4\frac{1}{2}$ l. per cent. duties payable for exports and imports at Barbadoes, has been held not to be rent or realty but merely a personal inheritance,(f) but, being settled on A. and the heirs of her body, was a fee-simple conditional;(f) so, an annuity charged upon the Post-Office, until a certain sum should be paid, in order to be laid out in land, continues to be mere personalty, and as such passes [*255] by grant or *transfer;(g) so, there can be no curtesy or dower of an annuity.(h)

263. Although an annuity in fee is an hereditament and as such is forfeitable for treason,(i) yet being only personal it is not an hereditament within the Mortmain Act;(k) so, before the abolition of Fines and Recoveries' Act, it was not the subject of a fine or recovery, being passed by mere grant or transfer;(l) so, an annuity is not within the Statute of Frauds so far as it affects real property;(m) so, it is not assets in the hands of the heir, because not comprised within the description either of lands or tenements; nor in the hands of executors, because its inheritable quality prevents it from going to them.(n)

Whether an annuity was assignable or grantable over was for some time doubtful, because it was looked upon to be merely a *chose in action*.(o) but it has since been ruled otherwise;(p) and in Gerard v. Boden,(q) it was said that an annuity was not so much in the personalty as hath been argued; so, it seems too that naming assigns is not essential to the making of an annuity assignable.(r)

III. Apportionment of an Annuity.

§ 264. At Common Law.

| § 274. By Statute.

§ 264. An annuity or rent-charge, like a rent-service, was formerly not apportionable; therefore where an annuity was payable at Lady-Day and

(c) Turner v. Turner, 1 B. C. C. 316; S. C., Ambl. 776; Weeks v. Peach, 2 Lutw. 1218.

(d) Sir T. Wroth's case, Plow. 475; 2 Vez. 181. (e) Turner v. Turner, sup.

(f) E. of Strafford v. Buckley, 2 Vez. 170.

(g) Holdernessee (Lady) v. Carmarthen (Marquis), 1 B. C. C. 377; see also Miles v. Williams, 1 P. Wms. 252; Forth v. Chapman, Id. 663. (h) 1 Inst. 144. b; Poph. 87.

(i) Nevil's case, 7 Co. 34 b. (k) 19 E. 3, Mortm.; 1 Inst. 2 b.

(l) Sheph. Touchst. 11; 1 Vez. 391; Pig. 97. (m) 2 Vez. 170.

(n) Doct. & Stud. C. 30, p. 97; 2 Vez. 179. (o) Perk. Sect. 101.

(p) Maund's case, 7 Co. 28 b. (q) Metley, 80. (r) But see contra, Perk. sup.

Michaelmas, and annuitant *died on Michaelmas-Day after sunset, his executors should have the last quarter's annuity which was [^{*256}] payable on that day; (*s*) *sed secus* if he had died before the day; (*s*) but now by the 4 & 5 W. 4, c. 22, where an annuitant dies between the times of payment, the executors or administrators may recover a portion of any annuity or annual sum for so much of the time as has elapsed between the last payment and the death. See further Dig. P. ii. tit. Apportionment; and as to rent-charges under the Tithe Commutation Act, see ante, § 141 et seq.

IV. Recovery of an Annuity.

§ 266. By Distress.

§ 266. By Writ of Annuity

§ 266. An annuity, like a rent-charge, when granted by deed is recoverable by distress only by force of the clause in the deed giving that power, (*t*) and so likewise in regard to the remedy by entry; (*u*) but where a rent-charge is created by will, although a power to distrain is not given in express terms, yet it has been deemed to be a consequence drawn by law from a rent-charge; (*x*) therefore where there was a devise of lands to A. for life, remainder to B. in fee, charged with the payment of £20 a-year to C. during her life, to be paid by A. as long as she should live, and after her decease to be paid by B.; the annuity was held to be a charge on the estate, and that C. might distrain for the arrears, although the will contained no power of distress. (*y*) (1)

An annuity which is only to charge the person is recoverable by what is called a writ of annuity, that is an action of debt for the recovery of an annuity, and it is said that where the rent is behind the grantee may choose *whether he will sue a writ of annuity and charging the person [^{*257}] only make it personal, or whether he will distrain for the rent behind, and so charge the land; (*z*) but he cannot have both the remedies together, for if he have a writ of annuity then the land is discharged, (2) but if he distrain for the rent and in replevin avow the taking of the distress, then is the land discharged; but he can determine his election only by action or suit in a court of record, for if he distrain only, he may still have his writ of annuity or personal action. (*z*) See further as to remedies post, INJURIES TO THINGS REAL AND THEIR REMEDIES.

(*s*) *Bellasis v. Cole*, 1 P. Wms. 179, n.

(*t*) See ante, §§ 151, 152.

(*u*) See ante, § 222.

(*x*) *Rodham v. Berry*, Watkins's Conv. by Cov. 243, n. (a).

(*y*) *Buttery v. Robinson*, 3 Bing. 332; 1 S. C., 11 Moore, 262.

(*z*) Litt. sect. 219; 1 Inst. 144, b.

(1) Compare *Robinson v. Townshend*, 3 Gill & Johns. 424.

(2) *Bosler v. Kuhn*, 8 W. & S. 185.

*Eng. Com. Law Reps. xiii. 20.

SECTION VI.

RIGHT OF COMMON.

§ 267. Under this head may be considered:—

1. The nature of a Right of Common and its different kinds
2. Incidents to the Right of Common.
3. Interests of the Lord and the Commoner.
4. Alienation of Common.
5. Apportionment of Common.
6. Extinguishment of Common.
7. Suspension of Common.
8. Revival of Common.
9. Injuries to the Right of Common and their Remedies.

I. The Nature of a Right of Common, and its different kinds.

§ 268. Definition.

| § 268. Different Kinds.

268. Common imports a privilege to take a profit in common with many, or, in other words, it is a right or privilege *which one or more persons claim, to take or use some part of that which another man's lands, waters, woods, &c., naturally produce, without having an absolute property in such lands, waters, woods, &c.(1) It is an incorporeal right, which lies in grant, originally commencing on some agreement between lords and tenants, which by time has been formed into prescription, and continues good, although there be no deed or instrument to prove the original contract.(a) It is distinguished as to the ground or reason of the right into common appendant, common appurtenant, common in gross, common *pur cause de vicinage* or because of vicinage; and again, according to the subject-matter, into common of pasture, common of estovers, common of turbary, and common of piscary.

Common appendant is a right annexed to the possession of land, by which the owner thereof is entitled to feed his beasts or take wood, &c. Common appurtenant does not arise from any connexion of tenure, but must be claimed by grant or prescription; common in gross is a right not annexed to land, but annexed to the person, and must be claimed by grant or prescription; and common because of vicinage where the inhabitants of two townships have usually intercommoned with each other. All these distinctions are applicable to common of pasture, but to common of estovers and the others they apply only in a partial degree.

(a) 4 Co. 37; 2 Inst. 65; 1 Vent. 387.

(1) Van Rensselaer v. Radcliff, 10 Wend. 647. Trustees v. Robinson, 12 Serg. & Rawle, 32.

I. Common of Pasture.

§ 269. What it is.

| § 269. Appendant or Appurtenant.

§ 269. Common of pasture, which is by distinction called simply common, being the most important of these rights, may be defined, when it is appendant, to be a right belonging to the owners or occupiers of arable lands, to put upon *the lord's waste, or upon the lands of other persons within the same manor, commonable beasts, that is, beasts that serve [*259] for the plough, as horses, or oxen and sheep, or kine, to manure the land.(b) For the most part the property in the soil is in the lord of the manor, but it may be in the particular tenants of common fields.(c)

Common of pasture is either appendant or appurtenant.

I. COMMON OF PASTURE APPENDANT.

§ 270. Is of common Right.

Need not be prescribed for.

Appendant to Land.

Not to a House.

To what Land.

Beasts levant and couchant.

271. Claimed for Commonable Beasts.

272. Number limited by Usage.

§ 273. Claimed by owners of Common Fields.

Lord and Tenant.

Corporations.

Infants, &c.

274. Copyholders.

275. Inhabitants.

276. Different Ways of User.

§ 270. Common of pasture appendant is of common right, and therefore a man need not prescribe for it ;(d) this kind of common must be time out mind, for it cannot now be created,(e)(1) and it cannot be claimed by way of custom.(f)

Common of pasture appendant may be considered :—

1. What it is appended to.
2. For what cattle it may be claimed.
3. Who may have it.
4. How it may be used.

1. *What it is appendant to.*

This common is regularly appendant to arable land,(g) not to a house ; therefore a claim of right of common without stint as annexed to an ancient

(b) 1 Inst. 122, a.

(c) Hickman v. Thorne, 2 Mod. 105.

(d) 1 Inst. 122; see also Harg. n. (2), 122, a.

(e) 1 Roll. Abr. 396.

(f) 6 Co. 59; English v. Burrell, 2 Wils. 258.

(g) Tyrringham's case, 4 Co. 37 b.

(1) Watts v. Goffin, 11 Johns. 493.

[*260] message without land *cannot as such exist by law ;(*h*) yet if a man prescribe for common appendant to a cottage, &c., it will be well, for it has a curtilage, &c.(*i*), but otherwise where there is no curtilage or land.(*k*)

It must be regularly appendant to arable land only, yet it may be claimed as appendant to a manor farm, a ploughland or a carve of land, though it may contain pasture, meadow, and wood, for it shall be presumed to have been all originally arable land, though afterwards converted into pasture, meadow, and wood ;(*l*) but it cannot be appendant to land which is improved within the time of memory out of the waste of the lord.(*m*)

2. For what Cattle it may be claimed.

271. This may be considered as to the sort of cattle, and as to the number of cattle, for which the right may be claimed.

The right can be claimed for commonable beasts only, that is, such beasts as will serve for the plough or to manure the land,(*n*) therefore, if a man prescribe for common appendant for all cattle it shall be bad,(*o*) and hogs, goats, geese, or the like, are not according to the usage of the common ;(*p*) the courts, however, will intend, that the beast are commonable unless the contrary appears.(*q*)

Common appendant cannot regularly be for a certain number of beasts, but for such only as are *levant* and *couchant* upon the land to which the right is appendant, and the number of cattle allowed to be *levant* and [*261] *couchant* shall be ascertained by the number of cattle which can be *maintained on the land by its own produce during the winter.(*r*)

“ In the case of a distress, those cattle only are said to be *levant* and *couchant* on the land, which have been there long enough for them to have lain down and risen up again, but in case of right of common it is different, for there it means cattle which are connected with the land in respect of which common is claimed.”(*s*)

The term common *sans nombre* does not mean innumerable, but only indefinite, not certain.(*t*)

272. But common appendant may by usage be limited to any certain

(*h*) *Benson v. Chester*, 8 T. R. 398.

(*i*) 2 Inst. 736 ; 2 Brownl. 101 ; *Emerton v. Selby*, 2 Ld. Raym. 1015 ; S. C., 6 Mod. 114, 174 ; see also *Arlett v. Ellis*, 9 B. & C. 671.^a

(*k*) *Scholes v. Hargrave*, 5 T. R. 46.

(*l*) 2 Inst. 85. 474 ; 2 Brownl. 298 ; Roll. Abr. 396.

(*m*) 5 Ass. 2, cited Bro. Commons, 16.

(*n*) 2 Inst. 85.

(*o*) 1 Roll. Abr. 397.

(*p*) 25 Ass. pl. 8 ; 37 H. 6, 34 ; Bro. Com. pl. 13 ; Finch. Law, 56.

(*q*) *Standred v. Shoreditch*, Cro. Jac. 580.

(*r*) *Cole v. Foxman*, Noy, 30 ; see also 8 Co. 79 ; 13 Co. 66 ; *Norse and Webb's case*, Noy, 145 ; *Patrick v. Lowre*, 2 Brownl. 101 ; *Dean and Chapter of Salisbury's case*, W. Jo. 282 ; *Sawyer's case*, id. 281 ; *Jeffry v. Boys*, Hard. 117 ; *Leniel v. Harslop*, 3 Keb. 66 ; *Benson v. Chester*, 8 T. R. 396.

(*s*) *Per Bayley*, *J. Cheesman v. Hardham*, 1 B. & A. 710.

(*t*) *Bennett v. Reeve*, Willes, 227.

number; (*u*) so one may have a right of pasture for thirty beasts in one place, and a similar right for ten out of another, both places being in the same waste; (*x*) so, the prescription was for four other beasts, three horses, and sixty sheep; (*y*) so, where there are several owners of a common field, the custom may be that they shall turn out cattle in proportion to the extent, and not to the produce, of the land in respect of which the right is claimed, (*z*) see further as to user of the common *infra*, § 276.

3. Who may have it.

273. Where there are several owners of common fields who have a right of intercommoning, the extent of their right is regulated by custom. (*a*)

Where there is lord and tenant, the lord has of course in ^{the} first instance a right to common in his own tenancy, (*b*) for the [^{*262}] benefit is mutual between lord and tenant. (*c*) The tenants here understood are such as are tenants of all waste lands in the manor, where the lord claims an immediate ownership in the soil so a matter of right, not tenants holding certain lands under him, for a custom, that the lord should have common in the lands of such tenants is bad. (*d*)

A man may, however, have two distinct rights of common in two distinct wastes of different manors. (*e*)

Ecclesiastical corporations, both sole and aggregate, may have common appendant, as a dean and chapter; (*f*) so, an abbot or parson; (*g*) so, lay-corporations; (*h*) so, infants, executors, assignees, husbands in right of their wives, and other representative persons, may also have this right vested in them; and as an alien may take a lease, so he may enjoy a right of common connected with the land he occupies under that lease. (*i*)

274. Copyholders can claim common by the custom of the manor only; (*k*) but no one can claim a right of this nature except it be in respect of land, and he must in the first instance shew that he derives title to the enjoyment of it through the original owners of such land: (*l*) and where a copyholder has common in a waste, without the manor of which his copyhold was parcel, it was held that he had it annexed to the land, and not to his customary estate, and he must, by reason of the weakness of his estate, prescribe in the *que estate*, that is, in the name of his lord; (*m*) and after ^{en-}franchisement, the feoffee must prescribe in a *que estate* of his lord, [^{*263}]

(*u*) 17 E. 26; Trulock v. Rigsby, Yelv. 185; Mills v. Ward, 1 Vent. 92; Chandler v. Melland, 2 Keb. 491.

(*x*) 17 E. 3. 34; 1 Roll. Abr. 397. (*y*) Mors v. Webbe, 1 Brownl. 180.

(*z*) Cheesman v. Hardham, 1 B. & A. 706. (*a*) Cheesman v. Hardham, sup.

(*b*) 2 Inst. 85. 474. (*c*) Mors v. Webbe, 2 Brownl. 298; see also 2 Mod. 275.

(*d*) White v. Sayer, Palm. 211. See also Mors v. Webbe, sup.

(*e*) Hollingshead v. Walton, 7 East, 485.

(*f*) Dean and Chapter of Salisbury's case, W. Jo. 282; Ely (Dean, &c.) v. Warren, 2 Atk. 189. (*g*) 17 E. 3. 26; Godb. 4.

(*h*) Meller v. Walker, 2 Saund.; Stables v. Melton, 2 Lev. 246. (*i*) Vaughn. 190.

(*k*) Crowther v. Oldfield, 2 Id. Raym. 1225; Fisher v. Wren, 3 Mod. 250.

(*l*) Crowther v. Oldfield, sup.

(*m*) Foiston v. Crachrode, 4 Co. 32; S. P., Barwick v. Matthews, 5 Taunt. 365; ^b S. C., 1 Marsh. 50.

¹Eng. Com. Law Reps. i. 135.

for himself and his customary tenants, till the time of the enfranchisement, and since that time for the feoffee and his heirs as appurtenant to the enfranchised tenement.(n)

275. Inhabitants as such, without any further title to common, cannot prescribe for common, as they are not fixed persons, and the right which they claim is permanent in its nature, being attached to land;(o) therefore, when the inhabitants of the city of Coventry claimed a right of common for beasts, without saying that they were *levant* and *couchant*, the plea was held bad;(p) but it would have been otherwise, if they had stated that the beasts were *levant* and *couchant*;(q) so, where a prescription was pleaded that every householder, time out of mind, ought to have common in a certain vill; it was resolved that the claim, being uncertain and indefinite, could not be allowed,(r) and the same rule applies so much the more to mere occupiers.(s) Houses newly erected can have no right of common when claimed by prescription.(t)

4. How it may be used.

276. The kind and number of cattle for which common appendant may be claimed has been already stated, see *supra*, § 271.

The user of common may be limited as to time in different ways. As a rule, common appendant shall be for the whole year or for a limited time,(u) therefore, there may be a prescription for common after the corn is cut and [*264] *carried, until the land is resown;(x) so, to have common in like manner if the land be sown with the consent of the commoners;(y) so, likewise to have common appendant after the corn was cut and carried during two successive years, and then throughout the year during the third;(z) and so of other prescriptions of like kind.

As a rule, a commoner cannot agist the cattle of a stranger;(a) *sed secus*, if he have no beasts of his own to manure the land;(b) so, a lord cannot agist a stranger's beasts without a prescription for so doing.(c) See further as to the rights of the lord and the tenant, post, § 314 et seq.; also as to commonable beasts, ante, § 271.

By the 32 H. 8, c. 15, various provisions are made against putting infected cattle to pasture on commons, and by 13 G. 3, c. 8, provisions are made to regulate the time and manner of depasturing common pastures. As to improvement and planting trees on commons, see Dig. P. ii. tit. Commons.

(n) *Barwick v. Matthews*, 5 Taunt. 365; S. C., 1 Marsh. 50.

(o) *Gatewood's case*, 6 Rep. 59.

(p) 15 E. 4. 32.

(q) *Id.* 29.

(r) *Ordway v. Orme*, 1 Bulst. 183; see also S. P., *Tinnery v. Fisher*, cited 2 Bulst. 87.

(s) *English v. Burnell*, 2 Wils. 253.

(t) Sav. 81.

(u) 1 Roll. Abr. 396.

(x) *Trulock v. Rigsby*, Yelv. 185; S. C., 1 Brownl. 169.

(y) *Hawkes v. Molineux*, 1 Leon. 73.

(z) *Walter v. Chauncer*, 1 Vent. 21; *Chandler v. Melland*, 2 Keb. 491.

(a) 22 Ass. pl. 84; 11 H. 6. 22, cited in Bro. Com. pl. 5.

(b) 45 E. 3. 26, cited Bro. Com. pl. 5; see also F. N. B. 180, B.; see also *Manneton v. Trevilian*, 2 Show. 328; S. C., nom. *Molliton v. Trevilian*, Skin. 137; *Rumsey v. Rawson*, 1 Vent. 18; S. C., 2 Keb. 410; S. C., T. Raym. 171.

(c) *Smith v. Feverell*, 2 Mod. 6.

II. COMMON OF PASTURE APPURTENANT.

§ 277. Definition.

Distinction between Common appen-
and appurtenant.

278. Annexed to what Land.

279. Claimed for what Beasts.

280. Number of Cattle.

281. Times of User.

282. Parties claiming Burgages.
Inhabitants.

Freemen.

283. User of the Common.

§ 277. Common appurtenant is a right of feeding one's beasts on the land of another, which is founded on a grant or a prescription which supposes a grant.

*It is distinguished from common appendant in the four following particulars:—1. It is against common right, and must therefore be [*265] prescribed for, if claimed by prescription; (*d*) *sed secus*, where there is a grant to show; (*e*) and a user for fifty years has been held to be evidence for a jury to presume a grant. (*f*) But being a profit à prendre in the soil of another, it cannot be claimed by custom. (*g*)

278. In the next place it may be claimed as annexed to any kind of land (see ante, § 270,) as not arising from any tenure; (*h*) it may be claimed therefore in respect of lands, in another lordship than that in which the waste is situated; (*i*) but it cannot be claimed as appurtenant to a house without any land; (*k*) but it is not necessary in pleading to state it as annexed to land *eo nomine*, for if laid as appurtenant to a thing, which, in intentment of law, *primâ facie* comprehends land, it is sufficient, as where it is laid appurtenant to a messuage, (*l*) or to a cottage; (*m*) for the law, upon demurrer, or after verdict, will presume that there is at least a curtilage belonging thereto, on which the cattle may be *levant* and *couchant*. (*n*) In this point the relaxation of the rule applies more properly to common appurtenant than to common appendant, although in the cases cited the two kinds of common seem to be confounded. But see Tyrringham's case, sup.; see also ante, § 270.

*279. Again, it may be claimed for any kind of cattle, not merely for commonable beasts or beasts of the plough, (*o*) but for every kind [*266] of beast not commonable, as hogs, goats, geese, &c. (*p*)

(*d*) Tyrringham's case, 4 Co. 37.

(*e*) Molliton v. Trevilian, 2 Show. 328; Skin. 137.

(*f*) Cowlan v. Slack, 15 East, 108; see also Tyrringham's case, sup.; Pretty v. Butler, 2 Sid. 87.

(*g*) Gatewood's case, 6 Co. 59; Grimstead v. Marlowe, 4 T. R. 717; Hardy v. Holliday, cited 4 T. R. 717. (*h*) 37 H. 6. 34; 15 E. 4. 33.

(*i*) F. N. B. 181, n.; Sacheverell v. Porter, Cro. Car. 482; S. C., 3 W. Jo. 396; Clarkson v. Woodhouse, 5 T. R. 412.

(*k*) Scholes v. Hargreaves, 5 T. R. 46; Bull. N. P. 59; Chester v. Benson, 8 T. R. 336.

(*l*) Patrick v. Lowre, 2 Brownl. 101; Hockley v. Lamb, 1 Ld. Raym. 726; but see contra, North v. Coe, Vaugh. 253.

(*m*) Co. Ent. 649 a; Emerton v. Selby, 2 Ld. Raym. 1015.

(*n*) Scamler v. Johnson, T. Jo. 227.

(*o*) See ante, § 276.

(*p*) 37 H. 6. 34 b; 15 E. 4. 33; 1 Inst. 122, a; Roll. Abr. 402.

Lastly, it may commence by grant within time of memory, *(q)* and may be severed from the land to which it is appurtenant. *(r)*

280. In other respects these two kinds of common agree. The number of cattle may be limited or unlimited. *(s)* When common appurtenant is granted for an unlimited number of cattle, the measure of profit which the commoner may enjoy is to be regulated by the number of cattle *levant* and *couchant* upon the land entitled to common, as in the case of common appendant; *(t)* and where a man claims common for all commonable cattle but does not say *levant* and *couchant*, this shall be intended commons *sans nombre*, according to the words; *(u)* but although this prescription be bad on demurrer yet held to be cured after verdict. *(x)*

281. There is no less diversity in the periods for using common appurtenant than for common appendant; a man may prescribe for it generally without mentioning any particular season of the year; *(y)* or the prescription may be for every year from the time of cutting and carrying away until [*267] the field was re-sown; *(z)* and where such is the prescription, and the land was not sown for seven years, held *that cattle might feed until it was sown again; *(a)* so, a particular place in a waste or common may be marked out for a common appurtenant. *(b)*

282. Burgagers in a borough may have common appurtenant to their burgages by prescription; *(c)* so, for beasts *levant* and *couchant* in their vill; *(d)* but an inhabitant of a town shall not have this common by reason of his commonage in an ancient messuage, not having any interest in the house, for this is neither common appendant nor appurtenant, or in gross or because of vicarage, for common such as this would be transitory and uncertain; *(e)* yet he may have it in a place where such right attaches, provided the cattle be *levant* and *couchant*; *(f)* and so it seems that in general inhabitants may claim by custom although they cannot prescribe; *sed queræ.* *(g)*

Freemen may prescribe in respect of ancient messuages, for they may be taken to include land on which their cattle may be *levant* or *couchant*. *(h)* So, it seems that a copyholder may prescribe for common for a limited number of cattle in land parcel of a manor, and this will be common appurtenant, and being a copyhold grant, it still remained attached to the manor, even during the time of its being enjoyed by the copyholder. *(i)*

(q) Saheverell v. Porter, sup.; Pretty v. Butler, 2 Sid. 87.

(r) 26 H. 8. 4, cited Bro. Com., pl. 1; Leniel v. Harslop, 3 Keb. 66.

(s) F. N. B. 181, n.; 1 Inst. 122, a; Day v. Spooner, 4 Vin. Abr. 591.

(t) See ante, § 271.

(u) Cheedle v. Mellor, 1 Sid. 313; S. C., nom. Cheedley v. Miller, 1 Lev. 196; S. C., 2 Keb. 108; see also Jenkin v. Vivian, Poph. 201; Hopkins v. Robinson, 1 Mod. 74.

(x) 1 Saund. 227; Stonesby v. Mussenden, 2 Sid. 87.

(y) 25 Ass. pl. 8, cited Bro. Com. 41; 1 Roll. Abr. 401.

(z) Musgrave v. Cave, Willes, 319.

(a) Walker v. Miller, 1 Freem. 23.

(b) Musgrave v. Cave, sup.

(c) Miller v. Walker, 2 Sid. 462.

(d) Cheedle v. Mellor, sup.

(e) Gatewood's case, 6 Co. 60; Fowler v. Dale, Cro. El. 362; see also Hob. 86; Foxall v. Venables, 2 Leon. 45; S. C., 1 And. 152; Godb. 97; Smith v. Gatewood, Cro. Jac. 152.

(f) 15 E. 4. 32, cited Bro. Com. pl. 8.

(g) Weekly v. Wildman, 1 Ld. Raym. 406.

(h) Hinekes v. Clerke, 2 Show. 78; S. C., 2 Lev. 252.

(i) Musgrave v. Cave, Willes, 319; see also Stamford v. Burgess, Sheph. Abr. 381.

283. As in the case of common appendant, *(k)* so in this kind of common a commoner as a rule cannot agist the cattle of a stranger, *(l)* yet he may borrow the cattle of *another person for the purpose of manuring the land, and with these he may use the common, *(m)* for he has thereby [*268] a special property in them ; *(n)* so, he may use the common with cattle which are for his household ; *(o)* but not with any which are kept for sale ; *(o)* and it seems that the lord, who is the owner of the soil, may license a stranger to put in his cattle, it being no wrong to him, and it cannot be a surcharging ; *(p)* but cannot exercise his right in so unlimited a manner as not to leave sufficiency of pasture for the commoner ; *(q)* and so, it seems on the other hand that a custom that the copyholders should have the sole and several pasture to the exclusion of the lord is good ; *(q)* but see further as to disturbance of common, post, § 348.

III. COMMON OF PASTURE IN GROSS.

284. What it is.
Grants of Common in Gross.
285. Who may take.
Not Inhabitants.
286. With what kind of Cattle it may be
used.

287. With what number.
Common sans nombre.
288. Where Common may be taken.
289. With whose Cattle it may be used.

§ 284. Common in gross is so called because it does not appertain to any land ; and it must be by grant or prescription, which supposes a grant ; and it may, like common appurtenant, commence at this day by writing, that is by grant ; *(r)* therefore if one grant so many acres of land, with as much common as belongs to his oxgang of land in a certain place, this is a good grant of common in gross ; *(s)* so, if he grants an assart with all the common that pertains to *one bovat of land ; *(s)* so, if a man grants common to the mayor and burgesses for all their cattle ; *(t)* and this right [*269] may be vested in a man and his heirs by deed, although he have not a foot of land in the place, for there is no connexion of tenure. *(u)*

285. This kind of common may be prescribed for by the mayor and burgesses of a corporation ; *(x)* but although the inhabitants of ancient mesuages in towns may prescribe for common as appurtenant to their houses ; *(y)* yet inhabitants as such cannot prescribe for common in gross, therefore where a man built a new house in such ancient town he could not prescribe for common by reason of such residency, *(y)* unless such new house had been

(k) See ante, § 276.

(l) 30 E. 3. 28, cited 1 Roll. Abr. 401; Molleton v. Trevilian, Skin. 137; S. C., 2 Lev. 2. *(m)* 14 H. 6. 6 b, cited Bro. Com., pl. 14; 1 Roll. Abr. 401.

(n) Manneton v. Trevilian, 2 Show. 328; S. C., nom. Molleton v. Trevilian, sup.

(o) 14 H. 6. 6, c. *(p)* Hoskins v. Robins, 2 Saund. 324; but see ante, § 276.

(q) Smith v. Feverell, 2 Mod. 6. *(r)* 1 Inst. 122, a.; Tyrringham's case, 4 Co. 33; 2 Inst. 477. *(s)* F. N. B. 180, N. (n.)

(t) Stables v. Mellor, 2 Lev. 246; see also Mellor v. Spateman, 1 Saund. 313.

(u) 2 Com. 34.

(x) Mellor v. Spateman, sup.

(y) Costard and Wingfield's case, 2 Leon. 44.

built upon the site of the old house ;(z) so, lessees cannot prescribe by reason of the imbecility of their estate ;(a) so, not the queen lest she should surcharge.(b)

286. A license to feed may be granted so as to include all manner of cattle, but a general license to feed is confined to commonable beasts only, yet such a license to feed for a particular period may include hogs and other beasts.(c)

287. This kind of common may be granted either for a limited or unlimited number ; in the former case it must be enjoyed according to the terms of the grant ; but in the case of common for an unlimited number, or common *sans nombre*, as it is termed, there has been some diversity of opinion. It has been long settled that this term as applied to common [*270] *appendant is restricted to cattle *levant* and *couchant* ;(d) so, in regard to common appurtenant,(e) as a prescription for all cattle commonable to depasture in the land of another is bad, for a man cannot have common *sans nombre* appurtenant to land, otherwise unnumbered beasts might be put in at pleasure ;(e) and in the absence of any contract, it has been held that no common is recognised by the law, but what is measured by levancy and couchancy ;(f) and so in the case of a grant, where the matter has been much discussed, the better opinion appears to be that a common in gross *sans nombre*, may be granted to an individual, provided he leaves sufficient for the lord ;(g) or, as Lord Coke says, "provided he leave sufficient for the tenant to feed there ;(h)" and it seems to be admitted that although a corporation may prescribe for a common in gross, yet they may not prescribe for a common in gross *sans nombre*.(i)

288. The place where common in gross may be taken ought to be specified in the grant, otherwise it will be void ;(j) but if stated generally, it is sufficient, as where A. grants lands to B., with common in all his lands, the grantee shall have common in all the lands which A. has at the time ;(k) so, where common is granted for twenty beasts in the manor of D., the grantee shall have common in every part of the manor he chooses,(l) but not in the grantor's garden or corn,(m) unless the grant be, wherever the grantor puts his cattle, and the grantor puts his cattle in his corn,(n) see further, Woolr. L. Com. c. 7.

[*271] 289. It was decided in an early case, that a commoner *entitled to common in gross could not agist the beasts of others in his common, therefore in replevin where the plaintiff's ancestor died seised of such common, and the plaintiff commanded his tenants to put in their beasts and use the common in his name, it was held, that the lord of the manor was justified

(z) *Ib.* ; see also 15 E. 4. 29, 33, cited Bro. Com. pl. 8.

(a) — v. Stringer, Cro. Car. 599.

(b) 27 H. 8, 10 b.

(c) *Smith v. Feverell*, 2 Mod. 7 ; S. C., 1 Freem. 199.

(d) *Bennett v. Reeve*, Willes, 232.

(e) *Saye's case*, March, 83.

(f) *Chester v. Benson*, 8 T. R. 396.

(g) 12 H. 8, 2.

(h) 1 Inst. 122.

(i) *Mellor v. Spateman*, 1 Saund. 343 ; see also 22 Ass. pl. 36 ; *Weekly v. Wildman*, 1 Ld. Raym. 405.

(j) 9 H. 6, 36 ; F. N. B. 180, G.

(k) F. N. B. 180, G. (l) 9 H. 3, 6, cited in Bro. Grants, pl. 5 ; and in 1 Roll. Abr. 404.

(m) *Smith v. Feverell*, sup.

in seizing the beasts;(*n*) *sed secus*, where the grantor of the common gives assent to the putting in of the beasts, the grantee not having any beasts of his own;(*o*) so, it seems that a man having a common in gross for a certain number of cattle may put in the cattle of a stranger and use the common with them.(*p*)

IV COMMON OF PASTURE BECAUSE OF VICINAGE.

290. What it is.

291. Not properly a Right.

Inclosure against such Common.

292. Time of taking this Common.

User of this Common.

293. Common of Shack.

§ 290. This kind of common is where the inhabitants of one or more townships or vills lying contiguous, or the tenant of two or more manors adjoining to each other, have been accustomed to intercommon time out of mind, the commonable beasts of either straying into the other's lands without hindrance, and this is common appendant only in as much as it must be by prescription.(*q*)

Common by vicinage can exist only between two townships that lie contiguous, and not where there is intermediate *land;(*r*) and he who has such common may not put his cattle into the land of the other, [*272] but he ought to put them in the land where he has common, and if they stray they are excused of trespass on account of the ancient usage and to save suits;(*s*) but such right of common exists over open downs adjoining the common.(*t*)

291. This kind of common is not properly a right like the other kinds, though usually reckoned as such, it being but an excuse for a trespass;(*u*) it is at best but a permissive right,(*x*) arising from neighbourhood where boundaries were not easily established;(*y*) so, this common not being properly a right does not prevent inclosure;(*z*) therefore not only the lord of one manor where a common of vicinage has existed time out of mind may inclose against the lord of another,(*a*) but also the proprietors of common fields may exclude each other if such has been the custom;(*b*) and where an inclosure has once been made, the common is gone;(*c*) but to take

(*n*) 45 E. 3, 25 b. cited in Bro. Com. pl. 40; also in Fitzh. Ass. pl. 225; also in 1 Roll. Abr. 402; see also S. P., 11 H. 7, B., and F. N. B. 189.

(*o*) 45 E. 3, 26, cited in Bro. Com., pl. 5; also in 1 Roll. Abr. 402.

(*p*) 11 H. 6, 22 b., cited in Bro. Com. pl. 47; also in Fitz. Com., pl. 3.

(*q*) Tyrringham's case, 4 Co. 38.

(*r*) Dy. 47 b.; Bromfield v. Kirber, 11 Mod. 72. (*s*) Tyrringham's case, 4 Co. 38.

(*t*) Heath v. Elliott, 4 Bing. N. S. 383; S. C., 6 Scott, 172.

(*u*) Musgrave v. Cave, Willes, 322; and see Tyrringham's case, sup.

(*x*) 2 Com. 34.

(*y*) Bract. 222; Britt. 144; Flet. 251.

(*z*) Musgrave v. Cave, Sup.

(*a*) 1 Inst. 122, a.

(*b*) Hickman v. Thorne, 2 Mod. 104; S. C., 1 Freem. 210; see also S. P., Bromfield v. Kirber, sup; Dean v. Clayton, 7 Taunt. 489; S. C., 1 Moore, 214; 2 Marsh. 577.

(*c*) 1 Roll. Abr. 399.

*Eng. Com. Law Reps. xxxiii. 336.

Id. ii. 183.

away the claim of such common there must be a complete inclosure, so as to prevent cattle from straying from one common to the other. *(d)*

292. The time of enjoying this privilege varies, as in the case of common appendant; it may either be throughout the year, *(e)* or that it should cease at the sowing of the corn; *(e)* but the intercommoning must take place at the *same time, one vill cannot have it at one season, and another [*273] vill at another season. *(f)*

So the townships or vills must be adjoining, *(g)* but it may be in several manors; *(g)* and where there are two manors in one town, the one manor may intercommon with the other. *(h)*

Common because of vicinage can be only for cattle *levant* and *couchant* upon the lands to which it is annexed; *(i)* and it must be used with commonable cattle; *(i)* and the use must be restricted within reasonable limits, for the inhabitants of one vill ought in putting in their cattle to have regard to the frank tenement of the other vill; *(k)* therefore where in the town of A. were 50 acres and in that of B. 100, such towns lying together, resolved that the town of A. could put no more cattle into their common of 50 acres than it would feed. *(l)*

293. There is a species of common by vicinage which is called common of shack, which prevails in the counties of Norfolk, Lincoln, and York, and is said to be a special manner of common for cattle to be taken in arable land after harvest, until the land be sown again. *(l)* Although according to the nature of this common every owner may inclose, yet he cannot do so to the exclusion of others, who have enjoyed the right of intercommoning there. *(l)*

[*274]

*II. Common of Estovers.

- § 294. Definition.
Different kinds.
Appendant or appurtenant.
295. How claimed.
By Grant or Prescription.
Not by Custom.
296. Who may enjoy it.
Occupant.
Copyholders.
Coparceners.
Not Inhabitants.

- § 297. What may be taken.
Underwood.
Great Wood.
298. Time of taking Estovers.
According to Usage.
299. How used.
To be spent in or upon the House.
Cannot be severed.
Nor sold.
Nor used for any other Purpose.

§ 294. Common of estovers is the right of taking necessary wood from the land of another; and, like common of pasture, is of different kinds, and

(d) Gullett v. Lopez, 13 East, 348.

(e) 19 E. 4. 10.

(f) Dy. 47 b.

(g) Bromfield v. Kirber, sup.

(h) Dy. 47 b.

(i) Corbett's case, 7 Co. 5.

(k) 13 H. 7. 14, cited Bro. Com. pl. 5.

(l) Corbet's case, sup.

is entitled to notice as to the mode of claiming it, the persons who may enjoy it, the things to be taken, the time of taking, and the user.

Common of estovers may be distinguished into the following kinds, namely, house-bote, that is wood for the necessary repairs of the house; fire-bote, or wood for consuming as fuel in the house; plough-bote or wood for the repair of ploughs and other implements of husbandry; cart-bote, for the repair of carts and wagons; and hay or hedge-bote, for the repair of hedges or fences.

This kind of common is either appendant or appurtenant, as if a man grants to another estovers for the repair of a certain house, then the right becomes appurtenant to that house; *(n)* and it must be claimed in respect of ancient premises; *(o)* and it has been frequently decided that none but ancient premises can have a right to this common, and if a man have such a common by grant he cannot build new houses and entitle himself to common in respect of them; *(p)* so, not in the case of new hedges; *(q)* so, if he convert the *premises to other purposes he cannot claim estovers; *(r)* but if a house having such a right attached to it be pulled [*275] down, and rebuilt on the same or another place, the prescription is not thereby destroyed; *(s)* and so if a house be enlarged or more chimneys built, the estovers shall remain to the old house. *(t)*

295. This right can be claimed by grant or prescription only; and if a grant be shown, then it will be held appurtenant, and it may be prescribed for as such; *(x)* and if it be appendant it is of common right, and may be pleaded without alleging a prescription. *(y)* If therefore a man will entitle himself to fire-bote, he ought to state his occupation of a house to which the liberty of taking fuel is attached; *(z)* so where the prescription was for all the thorns growing on a particular spot appurtenant to a messuage and an acre of land, provided they were used on the land on which they grew, this was held sufficient, without claiming in respect of an ancient messuage. *(a)*

As a common of estovers is a profit *à prendre*, and cannot therefore as a rule be claimed by custom, for a custom to take a profit *in alieno solo* has been holden to be bad, such a right can only be claimed by prescription; *(b)* and therefore a custom for all the poor householders to take estovers from the waste of another cannot be established; *(c)* but copyholders are an exception to this rule, see *infra* § 296.

296. As a rule, the occupant of a house shall have estovers, provided he can shew a prescriptive claim or a grant *entitling him thereto, *(d)* [*276] for there are many houses which have not such commonable right; *(d)* so, copyholders may have such a right, if a custom to that effect has existed in the manor. *(e)*

(n) Plowd. 381.

(o) Selby v. Robinson, 2 T. R. 758.

(p) F. N. B., 180, II.; 4 Co. 86.

(q) 1 Bulst. 94.

(r) 4 Co. 86.

(s) Hob. 40; Godb. 97; Sty. 446.

(t) 4 Leon. 241; 2 Ld. Raym. 1400.

(x) See ante, § 277; also Selby v. Robinson, sup.

(y) See ante, § 269.

(z) 11 H. 6, 11, B.; 7 E. 1. 27; 10 E. 4, 3.

(a) Dewelass v. Kendal, Yelv. 187; S. C., Cro. Jac. 256; 1 Bulst. 93; 1 Brownl. 219.

(b) Grimstead v. Marlowe, 4 T. R. 717; see also Gatesward's case, 6 Co. 59; Bean v. Bloom, 3 Wils. 456; S. C., 2 Bl. 926.

(c) Selby v. Robinson, sup.

(d) Vaugh. 190.

(e) Stebbing v. Gosnell, Moor. 546, pl. 727; S. C., Cro. El. 629; S. C., Anon., 1 Leon. 272; Swayne's case, 8 Co. 63; Glascock v. Peck, 12 Mod. 380; see also Hoskins v. Robins, 2 Saund. 320; S. C., 1 Vent. 123. 163.

So, the eldest coparcener shall as a rule have estovers, and the other a contribution in lieu thereof: but if there be no other parcel of the inheritance, they shall, if certain be divided; if uncertain, they shall be enjoyed alternately. *(f)*

But inhabitants as such cannot prescribe; they can substantiate such a right only by others, as a mayor and burgesses pleading it for themselves and the inhabitants of such a place. *(g)*

297. The commoner, in this case, is as a rule entitled to take only underwood, and loppings, &c., but there may be prescriptions more enlarged, as to cut willows for the repair of the house; *(h)* and in the case of fire-bote, grants have been construed to give liberty to take great wood, such as oaks, &c., where small wood is not to be had; *(i)* but the grantee can only take the wood he cuts himself, not that which is already cut; *(k)* if therefore the grantor cut down all the wood, the only remedy for the grantee is an action on the case. *(k)* The taking must in all cases be reasonable. *(l)*

298. The time of taking estovers may be varied according to the usages of different manors, thus there may be a prescription for taking estovers [*277] between the feasts of **St. Michael* and *Christmas*, *(m)* or throughout the year except in farming time; *(n)* so, the usage may be that estovers may not be had without the view of the bailiff, *(o)* if taken otherwise the party is liable to an action of trespass. *(o)*

299. It is an invariable rule that estovers must be spent upon the premises which give the right to take them; *(p)* and if to be used for repairs, they cannot be appropriated to any other purpose; *(q)* and this privilege, being once attached to a house, cannot afterwards be severed from it, therefore, if the owner of the house grant the estovers to another reserving the house to himself, or the house to another reserving the estovers to himself, the estovers shall not thereby be severed from the house, because they must be spent thereon. *(r)* On the same principle, if a man be seised of a house in right of his wife, and another grants to the husband and wife sufficient estovers to be burnt in that house, the estovers are appurtenant thereto, and shall descend to the issue of the husband and wife; *(s)* and so, if one has a house on the part of his mother, and competent house-bote be granted to him, to be burnt in the same house, this is appurtenant to the house, and although it be a new purchase, yet it shall go with the house to the heir of the part of the mother; *(t)* and whoever after acquires the house, shall have such common of estovers. *(u)*

For the same reason that the estovers cannot be used for any other than the purpose for which they were granted, they can in no case be sold; *(x)*

(f) 1 Inst. 164, 165.

(g) 15 E. 4. 29; *White v. Coleman*, 3 Keb. 247; S. C., 1 Freem. 134; see also *R. v. Warkworth (Inhab.)* 1 M. & S. 474. *(h)* *Fisher v. Wren*, 3 Mod. 250.

(i) Anon., 3 Leon. 16; *Russell & Broker's case*, Id. 218.

(k) *Stile v. Butts*, Moor. 411; pl. 516; S. C. Cro. El. 820. *(l)* Bract. 231; Flet. 266.

(m) Britt. 153; 10 E. 4. 2, B.

(n) *Russell & Broker's case*, 2 Leon. 209; S. C., 3 Leon. 218.

(o) 5 E. 3. 64; 8 E. 3. 54; 5 Co. 25. *(p)* 7 E. 4. 27; 10 E. 4. 8.

(q) *Earl of Pembroke's case*, Clayt. 47.

(r) Plowd. 381.

(s) 8 Co. 54.

(t) Ib., citing 38 E. 3. 10.

(u) Plowd. 381.

(x) 17 E. 3. 7.

so, the estovers can be used only for the repair of the house, in respect of which they were granted,^(y) or for rebuilding it if destroyed,^(y) but *no new house, nor any additions to the old one, shall be erected [^{*278}] with the estovers.^(z)

Common of estovers being to be used in a house cannot be common in gross.^(a)

III. Common of Turbary.

§ 300. What it is.

Appendant, &c.

Extent of the Right.

How this Common may be claimed.

§ 301. Persons entitled to enjoy this Right, or otherwise.

Not mere Occupant.

302. Not restricted as to the Place where to be taken.

303. Must be used for the proper Purpose.

§ 300. Common of turbary is the right to dig turf upon another's land or upon the lord's waste. This, like the other rights, may be either appendant or appurtenant;^(b) so, also, it may be in gross;^(c) but it cannot be appendant to land, because turves are to be spent in the house.^(d) And if it be appurtenant to a house, it will pass in a grant of the house.^(e)

This liberty is more ample than common of pasture, which is only a right of feeding on the herbage and vesture of the soil, as it renews annually, but this is a right of carrying away the soil itself. To this is nearly allied another common; namely, the liberty of digging for coals, stones, and minerals.^(f) The manner of claiming this right, the persons entitled to enjoy it and the manner in which it may be enjoyed, are the subjects which enter into the consideration of this common.

It must be claimed by grant or prescription in all cases, except where it is claimed by a copyholder, who should allege a custom.^(g)

*301. In respect to the parties entitled, or otherwise, to this right, there is no distinction between this and other rights of [^{*279}] common; it has been held that a mere occupant cannot have a right to carry away the soil of the lord, and, consequently, that the custom was bad which was laid to exist in such a person.^(h)

So, likewise, a mere inhabitant as such cannot have this right; but it seems that a mayor and burgesses may prescribe to have it for themselves and the inhabitants of such a place.⁽ⁱ⁾ So, a freeman may plead a custom to take turves or dig for slates or limestones for his own use.^(k)

(y) Earl of Pembroke's case, sup.

(z) 10 E. 4, 3; 4 Co. 87; 2 Leon. 44; 1 Ventr. 237; 1 Sid. 167.

(a) 5 H. 7, 7, B.

(b) 5 Ass. pl. 9; 7 E. 3, 43; 1 Sid. 354.

(c) 1 M. & S. 374.

(d) Tyrringham's case, 4 Co. 38.

(e) Bro. Com. pl. 36.

(f) 1 Inst. 122, a.; 1 M. & S. 474.

(g) 1 Taunt. 447.

(h) 2 Atk. 189.

(i) White v. Coleman, 1 Freem. 184.

(k) R. v. Warkworth, (Inhab.) 1 M. & S. 474.

Copyholders may also claim this common by custom, but the custom must be certain and definite, or the claim cannot be established. (*l*)

302. This right may be limited, as the other rights of common before mentioned; but where a replication, stating a right of turbary, was objected to, because the plaintiff did not entitle himself to take turves in a certain inclosed part of the common, and common of turbary did not extend throughout the whole waste as common of pasture does, held, "that a man may have common of turbary throughout the whole common, as well as common of pasture, though he cannot enjoy his right of common of turbary in those parts of the common where there are no turves, any more than he can enjoy his common of pasture in those parts of the common where there is no grass." Per Willes, C. J. (*m*)

303. Common of turbary, like common of estovers, must be used for no other than the purpose for which it was intended, namely, to be spent on the premises. A liberty therefore to dig turf does not extend to a right to [*280] dig for *sale; (*n*) for it must be expended on the premises in respect of which it is claimed; and a plea which claimed common of turbary as appertaining to an ancient messuage, but omitted to state that the turves were to be burnt in the house, was held bad; (*o*) so, a custom for all the customary tenants of a manor, having gardens, to dig turves for the improvement of their gardens has been held bad, because it was indefinite and uncertain. (*p*)

IV. Common of Piscary

§ 304. What it is.
Appendant, &c.
In gross.

§ 304. Not otherwise distinguished from
other Commons.

§ 304. Common of piscary is the liberty to fish in another man's fish-pond, pool, or river. This is distinguished from a common, free and several fishery, see ante, § 108.

This common, like the others, may be appendant, appurtenant, or in gross. In an early case, where a defendant justified as having a common of fishing in the place where &c. appendant to a certain house, his plea was held good; (*q*) but such a right can be claimed only in private rivers or waters; for there can be no prescription for a common of fishery in the sea as appurtenant to certain messuages, for a right to fish in the sea is common to all the queen's subjects. (*r*)

So, there may be a common of fishery in gross; for a fishery may either

(*l*) *Wilson v. Willes*, 7 East, 121.

(*m*) *Fawcett v. Strickland*, Willes, 71.

(*n*) *Valentine v. Penny*, Noy, 145; see also 4 Co. 37.

(*o*) *Hayword v. Cunningham*, 1 Sid. 354; S. C., 1 Lev. 231; 2 Keb. 290.

(*p*) *Wilson v. Willes*, sup.

(*q*) 4 E. 4. 29.

(*r*) *Ward v. Creswell*, Willes, 265.

be granted exclusively to one, in which case it seems to be properly a several fishery, (see ante, § 108) or it may be granted to one in common with others; *and if it be attached to the person in contradistinction to appendancy or appurtenancy, it is properly a common in gross, [*281] and so it was held to be in an early case;(s) and so, it was said that the royal fishery of the Banne was not appurtenant, but a fishery in gross.(t)

As to who may have this common, and in what manner it may be taken, this common has nothing to distinguish it from the other commons already mentioned, except so far as fisheries are under legislative restrictions.

V. Common in a Forest.

§ 305. Definition.

Saving of commonable Rights.

Extinguishment of the Right.

306. What may be taken.

§ 306. Time of taking.

Fence month.

For what Cattle.

Drifts of the Forest.

§ 305. Common in a forest is the taking of accustomed herbage and other things from the soil of another within the forest.(u) This, like other commonable rights, is either appendant, appurtenant, or in gross.(v) This right was reserved by an express clause in the Charter of the Forest, to all persons who should be in the enjoyment of common in lands or woods, that might thereafter be afforested. See Dig. P. i. tit. Forests.

Common appendant and appurtenant can be claimed only in respect of land within a forest; therefore, where a prescription was made for common in a forest, and it appeared that the place had been disafforested, but the special verdict did not find that it had been made forest again, on that ground judgment was given against the claimant;(x) and this is in accordance with the 33 E. 1, stat. 5, *Ordinatio Forestæ*, *which provides [*282] that in purlieus and disafforested grounds, persons shall not have common, but that such may be received again into the forest, if they will bear the burthen thereof. Under the 22 E. 4, c. 7; 35 H. 8, c. 17, s. 8; and 13 El. c. 25, s. 18, for inclosing woods in forests, (see Dig. P. i. tit. Forests), it has been held that the commoner is not necessarily excluded from his common by reason of such inclosure.(y)

306. Besides herbage and estovers generally, which are the proper subjects of commonable rights in a forest, there is one kind of estovers called pannage, consisting of acorns, beech mast, and the like, which may be more especially claimed there, and that too notwithstanding they are the food of swine, and that regularly swine have no place to common in a forest.(z)

(s) 4 Ed. 4. 29.

(t) Davis, 57.

(u) Manw. 95.

(v) Id. 97.

(x) Woolridge v. Dovey, Hard. 87; S. C., W. Jo. 292; see also Trigg v. Turner, 2 Show. 10.

(y) Barrington's case, 8 Co. 136; S. C., Godb. 167.

(z) But see 3 Bulst. 213; Bridgman, 26; and see infra.

The time of taking common in the forest is regulated not only by the forest laws, but by several Acts of Parliament, as the 20 C. 2, c. 3, for the preservation of timber in the Forest of Dean, and the 9 & 10 W. 3, c. 36, for the preservation of timber in the New Forest. The rights of the commoners are restricted by the crown being enabled to inclose considerable parts of it, and it has been held under this latter statute that the right of common in the inclosed parts is restrained absolutely, during the period of inclosure, but continued in the uninclosed parts under certain restrictions.^(a)

By Manwood it is said that commonable cattle only, according to the forest, can be put on the common during the fence month;^(b) but a prescription to have common for cattle in the forest at all times of the year, without excepting the fence month, has been held good.^(c)

[*283] *Regularly, all beasts may be put to common in a forest, except goats, sheep, swine, and geese, for which last it has been said that there cannot be a prescription,^(d) and so as to sheep and swine.^(e)

By the 32 H. 8, c. 13, s. 2, stone horses above the age of two years, and not of the height of fifteen hands, are not to be put to feed on any forest, chase, or common, &c.

By s. 2 of the same statute, the time and manner of making drifts of the forest are regulated.

These drifts are said to be when all the cattle, as well of commoners as of strangers, are driven by the officers of the forest to some certain inclosed place, and the object of them is to see whether the commoners common with such cattle as they ought; also, that they do not surcharge the forest; and also, that there be no cattle of any stranger commoning there.^(f)

II. Incidents to a Right of Common.

§ 307. Seisin.

How acquired.

308. Is subject to Dower.

Common sans nombre, when.

Common in gross, when.

Subject to Curtesy.

§ 309. Grantably by copy.

310. Rateability.

311. Subject to Tithe.

312. Sufficient to give a Settlement.

313. How subject to Distress.

§ 307. The principal incidents to a right of common are what relates to the seisin or possession of a common, the estates to be had in a common, the liability to rates and tithes, and the law of settlement and distress.

As to the seisin necessary to entitle a commoner to the remedies against disseisin, (see post, § 352,) it appears, a tortious use of a common, or a user

(a) Biddlecombe v. Kerwell, 2 Burr. 1118. (b) Manw. 92; see W. Jo. 283.

(c) Trigg v. Turner, 2 Show. 9; S. C., Pollexf. 443; S. C., 3 Lev. 98; S. C., 3 Keb. 746; S. P., Brabrooke v. Carter, 3 Lev. 127; S. C., 1 Lutw. 81.

(d) Manw. 100; but see contra, Webb's Hærcas Corpus, 3 Bulst. 213.

(e) Ib.; also 4 Inst. 298; W. Jo. 293; 2 Show. 10; Hard. 87.

(f) 4 Inst. 302.

of a common by a tenant *at will, is not sufficient; (*g*) but it is said that the user by tenant at will would (before the 3 & 4 W. 4, c. 27, [*284] s. 36, abolishing the remedy by assize,) have given such a seisin to him in the reversion that he might have had an assize, if he or his tenants had been ousted or disturbed. (*h*)

A user of borrowed cattle will it seems enable a commoner to acquire a seisin, if he have not sufficient cattle of his own, and borrows for the purpose of manuring the land; (*i*) but it is not settled whether putting in cattle for the mere purpose of gaining a seisin be good. (*i*)

No certain number of beasts is necessary to give seisin, for user of a common *sans nombre* will have this effect. (*k*)

As to the persons through whom seisin may be acquired, the seisin of the tenant for life or years is sufficient for him in reversion, (*l*) but the seisin of the ancestor is not sufficient for the heir; (*m*) so, if a copyholder enter as a commoner, his entry will be taken to be in right of the lord, though not by his command, and he have not even notice of it. (*n*)

If a man be disseised of his land, to which common is appendant, he loses his right to the common until he recovers seisin. (*o*)

308. Common appendant or appurtenant is subject to dower, because it is certain in its nature, and if it be such a common as will go to the land whereof a woman is dowable of, it shall be intended after verdict to be the one or the other; (*p*) but of a common *sans nombre* a woman is not dowable, and where it is without stint it has been determined that it goes to the heir, for it is not divisible, since if both the heir and the widow were allowed to exercise the *right, there would be a double stocking of the waste, which is not reasonable; (*q*) but in favour of the dowress the [*285] Courts will after verdict intend the common to be appendant or appurtenant, rather than common *sans nombre*. (*r*)

So, although a woman will be dowable of a common in gross, if it be certain, yet in order that it may be ascertained the demandant ought to shew for what cattle she makes her claim; therefore, where a widow demanded the then part of a foldcourse, without saying in certain to what description of beasts she held herself entitled, her claim was disallowed for want of greater certainty. (*s*)

For this reason it is, that a tenement being an uncertain thing dower will not lie for it. (*t*)

309. There may be curtesy of all commons not excepting common *sans nombre*; for the husband having the whole inheritance, there is no occasion for it to be divided as in the case of dower. (*u*)

A right of common, like other incorporeal hereditaments, is grantable by

(*g*) 45 E. 3, 25, cited Bro. Com. pl. 5; Bro. Seisin, pl. 5; 22 Ass. pl. 84, cited Bro. Com. pl. 36, 40; 14 H. 6, 6, cited Fitzh. Ab. pl. 238.

(*h*) F. N. B. 180, (1.)

(*i*) 45 E. 3, 25, &c., sup.; Kitch. 123.

(*k*) 11 H. 6, 23.

(*l*) 45 E. 3, 25, sup.

(*m*) Ib.; see also 1 Roll. Abr. 404.

(*n*) Anon., Sty. Pasch. 1653.

(*o*) 1 Inst. 122, b., citing 19 H. 6, 33.

(*p*) Pruet v. Drake, Cro. Car. 300; F. N. B. 148, C.

(*q*) 1 Inst. 30, b., 32, a.; Perk. s. 341; 1 Roll. Abr. 675.

(*r*) Pruet v. Drake, sup.; see also S. C., W. Jo. 315.

(*s*) Anon., Godb. 21, pl. 27.

(*t*) Anon., Stra. 625, recognising Pruet v. Drake, sup.

(*u*) 4 Inst. 30, b.

copy of court roll, being parcel of a manor, and this it seems applies no less to common in gross than to common appendant.(x)

310. Right of common being an incorporeal hereditament, is not liable to be rated to the relief of the poor; therefore, where the burgesses of Nottingham and the occupiers of ancient messuages there, had, as such, for a certain portion of the year, a right to turn cattle into certain fields, and to exclude during that period the owner of the soil, this was held to be a mere right of common and not rateable to the relief of the poor,(y) that not being [*286] an exclusive *occupation so as to bring it within the 43 El.;(z) for although a right of common in gross is a tenement,(a) yet to make it rateable it must be coupled with an exclusive enjoyment of the land for the time; therefore, where a corporation was seised in fee of waste lands, and meted them out to the resident burgesses according to a certain stint, regulated by a leet jury, held, that the burgesses, who were tenants in common, were liable to be rated as occupiers of the land;(b) so, where trustees let out aftermath to different persons, they were held rateable for such occupation.(c) See further Dig. P. iii. tit. Poor (Rate.)

In *Jones v. Maunsell*,(d) it was much discussed but not settled whether the herbage and pannage of a forest in the hands of a subject be rateable under the 43 El.; but in *Lord Bute v. Grindal*,(e) it was held that the ranger of a royal park is not rateable for the herbage and pannage when it yields no profit.

311. Where common is appendant or appurtenant it is considered as part of the land, and, therefore, is exempt from tithe, because it is paid in regard of the land to which it appertains;(f) but it is otherwise with a common in gross, for that is annexed to the person, and not to land, therefore the party entitled to such common must pay an agistment tithe in respect thereof.(g)

Regularly, common of estovers, turbary, and piscary, are not liable to tithes, but they may be so by special custom.(h)

312. Before the 59 G. 3, c. 50, (see Dig. P. iii. tit. Poor *(Settlement.)) a settlement might have been gained by the renting of a common in gross of the value of £10 or upwards, for a right of common was held to be a tenement within the 13 & 14 C. 2;(i) and the hiring of common of piscary, or of any other kinds of common, has also been held sufficient to give a settlement;(k) but where a pauper freeman was entitled to

(x) *Musgrave v. Cave*, Willes, 324, overruling *Sands v. Drury*, Cro. El. 814; S. C., cited *Hargr. Co. Litt.* 53, b. See also *Co. Cop.* s. 17; *Com. Dig.* tit. Copy (C. 1); 6 Vin. Abr. Cop. (E.) pl. 1.

(y) *R. v. Churchill*, 4 B. & C. 750.^a

(z) *R. v. Watson*, 5 East, 481; S. C., 2 Smith, 45.

(a) *R. v. Dersingham*, (Inhab.) 7 T. R. 671.

(b) *R. v. Watson*, sup. recognizing *R. v. Aberavon*, (Inhab.) 5 East, 453.

(c) *R. v. Tewkesbury*, (Burgesses, &c.) 13 East, 155. (d) 1 Dougl. 302.

(e) 1 T. R. 333.

(f) *Ellis v. Fermor*, Gwill. 1022.

(g) Gwill. 1027; *Toller on Tithes*, p. 89; *Hatfield v. Rawling*, Gwill. 1030, n.

(h) *Toller on Tithes*, p. 89, et seq.

(i) *R. v. Dersingham*, (Inhab.) 7 T. R. 671.

(k) 1 T. R. 361.

a stinted common of pasture, and also a right to cut peat for his own use, and get limestones, &c. on a moor, yet had never exercised the first of these rights, or ever had any cattle with which to exercise the right, it was held that he had not such an estate as would make him irremovable under the 13 & 14 C. 2.(1)

313. At common law it seems there could be no distress of cattle on a common, but the 11 G. 2, c. 19, s. 8, authorizes a landlord or other person on his behalf to seize, as a distress for arrears of rent, any cattle or stock of their tenants feeding or depasturing upon any common appendant or appurtenant, or in any way belonging to all or part of the premises demised or holden.

III. Interests of the Lord and Commoner.

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| <p>§ 314. Interest of the Lord in the Soil.
 315. Power to grant Part of Common.
 316. Lord's Right of Common.
 Agistment of a Stranger's Cattle.
 317. Right to distrain Cattle Damage Feasant.
 318. Right to keep Conies, &c.
 Right to dig and work Mines, &c.
 319. Right to approve.
 320. Who may approve.
 Extent of the Right.
 321. Subjects of Approvement.
 Sufficiency must be left for Commoner.
 322. Manner of Approving.</p> | <p>§ 323. Building on the Waste.
 323. To depasture only.
 Commoner cannot meddle with the Soil.
 324. Remedies for the Commoner against the Lord.
 In case of Surcharging.
 In case of Inclosure.
 325. Cannot abate Nuisance, when.
 326. Cannot distrain for Damage feasant.
 326. Right to exclude Lord, when.
 327. Commoner's Remedies against Strangers.
 328. Commoner's Rights, not to be abridged.</p> |
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*1. Interest of the Lord.

[*288]

§ 314. The lord of the manor has the sole interest in the soil of the common,(1) but the interest of the lord and the commoner in the herbage are considered as mutual:(m) a prescription or custom, therefore, to exclude the owner totally from all manner of profit is void, as unreasonable and against the nature of common, it being implied in the first grant, that the lord should have his reasonable profits there:(n) and if the owner of the soil grants to another common *sans nombre* there, yet the grantee cannot use the common with so many cattle that the grantor shall not have sufficient common for his own:(o) but one may prescribe or allege a custom to have *solam vesturam terræ*, from such a day to such a day, and exclude the owner,(p) and so one may prescribe to have *separalem pasturam*:(q) how-

(1) R. v. Warkworth, (Inhab. 1 M. & S. 473.

(m) 2 Comm. 35.

(n) 15 E. 2. Prest. 51; 12 H. 8. 2; 1 Inst. 122, a.

(o) 12 H. 8. 2; 2 Roll. Abr. 396; S. P., Roll. Rep. 335.

(p) 1 Inst. 122.

(q) 1b.; but see Kenrick v. Pargiter, Yelv. 129; S. C., Noy, 139; 1 Brownl. 18; Potter

(1) Wellington v. Petitioners, 17 Pick. 91.

ever, notwithstanding this prescription, the lord is not excluded from other profits, as mines, trees, &c.(r)

[*289] But if a tenancy escheat to the lord his common shall *not increase on that account, for common is appendant to the demesnes and not to the services.(s)

So, the lord may exercise an entire dominion over the soil subject to the commoners' rights,(t) and the rights of the common may be so subservient to the rights of the lord in the soil, that the latter may dig clay pits there, or empower others so to do, without leaving sufficient herbage, if it can be proved that such a right has been constantly exercised by the lord.(u)

315. So, the lord by prescription may, with the consent of the homage, grant a part of the common to be built upon.(v) And this is independent of the Statute of Merton.(w) So, it may be a valid custom for the lord, with the assent of the homage, to grant parcels of the waste to be holden by copy of court roll, and for the grantees to inclose the same and to hold them in severalty freed from all common of pasture and turbary against the commoners, and in exclusion of their rights;(x) but a custom for the lord to grant leases without restriction, so as to annihilate the rights of the commoner, is bad in law.(y)

316. Where the lord's right is not limited by prescription he may put in any number of cattle he pleases, so that he leave sufficient for the commoners, and he may even surcharge any surplus there may be of common beyond what the commoners have a right to;(z) but he cannot, without a prescription, agist the cattle of a stranger upon the common;(z) although [*290] he may by deed license a stranger *to put in his cattle, leaving sufficient for the commoners.(a)

If the lord alien the fee, saving his power of feeding as lord, he shall have common;(b) but it is otherwise if he aliens without any saving, yet his alienee shall have common;(c) and if he grant a right of common in a certain place, he cannot even erect a rick there.(d)

317. The interest of the lord in the soil is such as to entitle him to dis-train, as for *damage feasant*, the cattle of any one who has no right to common there, even though he have not any interest in the herbage, and he may likewise have an action for every other trespass, however small; while the commoner on the other hand can maintain none but for such trespasses as are detrimental to his interest.(e)

v. North, 1 Saund. 347; S. C., 1 Lev. 268; North v. Cox, 1 Lev. 253; S. C., Vaugh. 251; 2 Keb. 577; Hoskins v. Robins, 1 Vent. 123; 2 Saund. 320; S. C., 2 Keb. 750; S. C., Pollexf. 13; S. C., 1 Mod. 74.

(r) Hoskins v. Robins, 1 Vent. 164; also sup., Potter v. North, 1 Vent. 333:

(s) 18 E. 3. 48.

(t) Doe v. Davidson, 2 M. & S. 175.

(u) Bateson v. Green, 5 T. R. 411.

(v) Folkard v. Hemmett, 5 T. R. 417, n.

(w) Boulcott v. Winnill, 2 Campb. 261; Lord Northwick v. Stanway, 3 B. & P. 346.

See also Lady Wentworth v. Clay, Fin. Rep. 263.

(x) Badger v. Ford, 3 B. & C. 153.

(y) F. N. B. 125.

(z) 30 E. 3. 27; 1 Roll. Abr. 396.

(a) Smith v. Feverell, 2 Mod. 6; S. C., Freem. 190; Birch v. Wilson, Id. 274; Woolton v. Salter, 3 Lev. 104.

(b) 18 E. 3. 43; 18 Ass. 56, pl. 4; Br. Comm. pl. 22.

(c) Ib.; 1 Roll. Abr. 396.

(d) Farmer v. Grant, Cro. Jac. 271; Yelv. 201.

(e) Hoskins v. Robins, 2 Saund. 328.

318. The lord of the soil may put in the common conies and other beasts of warren;(f) and the commoner may not kill or chase them;(g) but the number of the conies must be reasonable;(h) and the lord must not use his warren to the prejudice of the commoner.(i)

So, the lord may work mines or dig brick earth;(j) so, he may plant trees so as not to injure the common;(k) and equity will not give the tenant relief, it being held that the *lord is entitled to the soil of [*291] the waste;(l) so, the lord may make fish-ponds on the common, subject to the same restriction.(m)-

So, it has been laid down as a rule on this point, that where there are two distinct rights claimed by different parties, which encroach on each other in the enjoyment of them, the question is which of the two rights is subservient to the other. It may be either the lord's right which is subservient to the commoners', or the commoners' which is subservient to the lord's. In general, one would say, that the lord's is the superior right, because the property of the soil is in him; but if the custom, established by evidence, shew, that it is subservient to the commoners', then he cannot use the common beyond that extent.(n)

319. The most important right belonging to the lord in his wastes is that of appropment, a right given to the lord by the Statute of Merton. (20 H. 3, c. 4,) and extended by other statutes (Westm. 2, c. 46; 3 & 4 E. 6, c. 3, &c.; see Dig. P. ii. tit. Commons,) by which he is authorized to inclose and convert to the uses of husbandry any waste ground, woods, or pastures appendant to the estates of his tenants, or on which they have common. At common law, it seems that the lord could not approve against his tenants,(o)(1) it being supposed that the right of common issued out of the whole waste;(p) but on this point there appears to have been some diversity of opinion.(q)

320. Although the lord of the manor only is mentioned in these statutes, yet it has been extended by construction to any owner of the soil;(r)(2) and

(f) 22 H. 6. 59; *Bellew v. Langden*, Cro. El. 876; S. C., Ow. 114; *Coney's case*, Godb. 122; S. C., nom. *Ould v. Coney*, 4 Leon. 7; see also *Horsey v. Hagberton*, Cro. Jac. 229; *Hassard v. Cantrell*, 1 Lutw. 38; *Cooper v. Marshall*, 1 Burr. 259; S. C., 2 Wils. 51.

(g) *Hoddesdon v. Gresil*, Yelv. 104; *Ould v. Coney*, 4 Leon. 7.

(h) *Goe v. Cother*, 1 Sid. 106.

(i) *Grisell v. Leighe*, W. Jo. 12.

(j) *Coo v. Cawthorn*, 1 Keb. 390.

(k) *Kirkby v. Sadgrove*, 1 B. & P. 13; S. C., T. R. 483; 3 Anstr. 892.

(l) ——— v. *Palmer*, 5 Vin. Abr. 7.

(m) *Ow.* 114.

(n) *Per Buller, J.*, *Bateson v. Green*, 5 T. R. 416.

(o) 2 Inst. 85.

(p) *Ib.*; and see 2 Inst. 474.

(q) See 1 Roll. Rep. 365; 1 Taunt. 437; 3 Comm. 241; and Dig. P. ii. tit. Common.

(r) *Glover v. Lane*, 3 T. R. 445.

(1) If sufficient be left for their use, it seems he may, in *New York*, *Van Rensselaar v. Radcliff*, 10 Wend. 653. These statutes do not apply to *Pennsylvania* where the relation of lord and tenant never existed. *Trustees v. Robinson*, 12 S. & R. 33.

(2) It is well settled, that a square or vacant land dedicated to public use expressly or by implication, as by a conveyance bounded on a square recited to be so dedicated, *Emerson v. Wiley*, 10 Pick. 310, *Abbott v. Miles*, 3 Vt. 521, cannot be resumed or approved. *Id.* Every other use of it becomes a nuisance. *Commonwealth v. Alberger*, 1 Whart. 469. *Rung v. Shoenberger*, 2 W. 23.

[*292] a lord who is in by wrong *may, by force of the Statute of Merton, approve against the tenants and commoners.(s)

The subjects of approvement are commons appendant and appurtenant, for the words of the statute seem to be confined to such portions of the waste as are attached to a tenement,(t) and a common by vicinage being nearly allied to the first of these, is approvable within the statute,(u) but not a common in gross,(v) for the lord cannot approve against his own grant.(w)(1) So, it has been held that there can be no approver in derogation of a right of common of turbary, since the lord cannot approve against his own grant, and common of turbary necessarily arises by a grant;(x) but if there are two distinct rights in the same waste, one of which may be approved against and the other not, the approver may take place if there be no injury to the other;(y) therefore, where there was common of turbary and common of pasture on the same waste, it was held, that the common of turbary would not hinder the lord from inclosing against the common of pasture; so, where a right to take gravel was united with a right to take pasture.(z) See further as to the construction of these acts, Dig. P. ii. tit. Commons, and the notes there. So a custom authorizing the owners of ancient messuages, after clearing certain moss dales, to approve and hold them in severalty has been sustained;(a) so, a custom for tenants in a manor to enclose does not abridge the common law right of the lord to inclose;(b) but the party who has inclosed, is *not entitled to common in respect of the land inclosed,(c) because he cannot prescribe for what is so improved.(d)

321. But the lord or owner of the soil who improves, whether at common law or under the statute, must leave sufficient for the other commoners;(e)(2) and the lord must not improve the whole land, even although he leave sufficient in other lands, 2 Co. 25; but see 3 E. 3, cited Bro. Com. pl. 52, where it was held, that where a lord had common in three villis, he might approve in the one vill, leaving sufficient in the other two. The insufficiency of common left is to be presumed where the plea states that the inclosure, no matter by whom made, prevented the full enjoyment of the common;(f) so, the extent of the right to approve is a question for the

(s) Hamerton v. Eastoff, Clayt. 38.

(t) 2 Inst. 86.

(u) Bro. Ass. 446; Smith v. How, 4 Co. 38, cited 1 Inst. 122, a.; Harding v. Brooks, 3 Keb. 24; see also Dean v. Clayton, 7 Taunt. 489.^a

(v) 2 Inst. 475.

(w) 34 Ass. pl. 11; cited Bro. Com. pl. 26; Farmer v. Hunt, Cro. Jac. 271; S. C., Yelv. 201; 1 Brownl. 220.

(x) Grant v. Gunner, 1 Taunt. 435.

(y) Fawcett v. Strickland, Willes, 57; S. C. Com. 57.

(z) Shakespear v. Peppin, 6 T. R. 741.

(a) Clarkson v. Woodhouse, 5 T. R. 412, n.

(b) Duberley v. Page, 2 T. R. 932, n.

(c) How v. Strode, 2 Wils. 269.

(d) 2 Inst. 87; 4 Leon. 44.

(e) Dy. 316; 2 Inst. 88; Godb. 117.

(f) Rogers v. Wynne, 7 D. & R. 521, recognising 2 Inst. 88; and Greenhaw v. Isley, Willes, 619.

(1) And if the lord make a colourable lease for the purpose of depriving the tenant of his estovers, though it would be void, and might be treated as a nullity, yet the tenant is not bound to run that risk, but may submit to the lease and take his estovers in any other lands of the lord. Van Rensselaar v. Brice, 4 Paige, 174.

(2) Van Rensselaar v. Radcliff, 10 Wend. 563.

jury, for the right to approve depends upon the question of sufficiency having been left at the time for all the persons having right of common;(*g*) and if at the time of the approvement sufficiency be left, it is good, and the approvement shall remain, although afterwards it turn out to be insufficient.(*h*)

Where a common has been inclosed for the space of thirty years, it shall not afterwards be thrown down;(*i*) and if it be suggested that an inclosure is an improvement under the Statute of Merton, an injunction will be granted until the matter is determined at law.(*k*)

322. The waste ground, set apart by the lord, must be divided by some inclosure or fence, for if the tenant's cattle stray into the approved part, the tenant will not be a trespasser;(*l*) but gaps will not prevent a parcel thus severed *from being considered as an inclosure;(*m*) so, where commoners inclose, one who does not inclose cannot distrain cattle [*294] *damage feasant*.(*n*)

By the Statute of Westminster 2, a power is also given to the lord to erect certain buildings there specially mentioned, as a windmill, sheepcote, dairy, court, and necessary curtilage; and by construction this statute has been extended to a house for the habitation of the lord, or that of his shepherd;(*o*) and it seems that in this case the lord is not obliged to leave sufficient pasture.(*p*)

2. Interest of the Commoner.

323. The interest which a commoner has in the common is, in the legal phrase, to eat the grass with the mouths of his cattle; he must not meddle with the soil, nor with its fruit and produce, not even though it may eventually improve and meliorate the common;(*q*) therefore, a commoner cannot make a trench or ditch to let the water off, unless there is a custom to authorize him;(*r*) so, unless by special prescription he cannot cut rushes;(*s*) nor fill up coney burrows;(*t*) so, he cannot cut down trees.(*u*)

Although the lord is by presumption of law altogether entitled to the soil, yet a custom giving the commoner a right even to mines may be established, and acts of ownership for a number of years may be admitted in evidence of such a custom.(*v*)

*324. As a rule, the lord can do no act to injure the common of the tenant, and, therefore, he cannot surcharge the common; as, [*295]

(*g*) Arlett v. Ellis, 7 B. & C. 346.^b

(*h*) 2 Inst. 87.

(*i*) 1 Vern. 32.

(*k*) 2 Vern. 301.

(*l*) 2 Inst. 87.

(*m*) Paston v. Uthert, Litt. Rep. 267.

(*n*) Wells v. Pearey, 1 Bing. N. S. 556; ^c S. C., 1 Scott, 426.

(*o*) 2 Inst. 476; Nevill v. Hamerton, 1 Sid. 79; S. C., 1 Lev. 62; S. C., 2 Keb. 283.

(*p*) 2 Inst. 476. (*q*) 12 H. 8, 2, a.; 2 Leon. 201, 202; Godb. 123; 1 Roll. Abr. 406.

(*r*) Howard v. Spencer, Bro. Com. pl. 48; 1 Sid. 251; 2 Bulst. 116; Godb. 182.

(*s*) Bean v. Bloom, 3 Wils. 456.

(*t*) Carrill v. Paek, 2 Bulst. 116; Horsey v. Hayberton, Cro. Jac. 229, recognised in Cooper v. Marshall, 1 Burr. 259; and in Sadgrove v. Kirby, 6 T. R. 483.

(*u*) Sadgrove v. Kirby, sup. (*v*) Curtis v. Daniel, 10 East, 273.

^bEng. Com. Law Reps. xiv. 53.

^cId. xxvii. 492.

when he put an unreasonable quantity of conies on the common, an action against him was sustainable. (x)

So, if he makes improvements, it is incumbent on him to leave sufficient pasture for the commoners, and the commoner may have an action of trespass, or on the case, if the lord commit any excess; (y) so, if the lord plant trees to the prejudice of the common. (z)

So, if the lord by any inclosure leave not sufficient common, the commoner may justify breaking down the inclosure, (a) as to abate a hedge or any other erection, for he does not thereby meddle with the soil, (b) for a hedge, a gate, or a wall, to keep the commoners' cattle out is inconsistent with a grant which gives them a right to come in; (c) but unless the lord does any act which totally excludes the commoner from the enjoyment of his rights (in which latter case the commoner may do whatever is necessary to let himself into the common,) the commoner can assert his right by no act of his own, because he cannot make himself a judge in his own cause. (d)

325. On the other hand, if the commoner's right be only abridged and not totally destroyed, he must not abate the nuisance by his own act, but must resort to an action suited to the nature of the injury; (e) therefore, when the greater part of the common is occupied by a pond, the commoner may let out the water; *sed secus*, if he can get to any part of his common; (f) in this latter case he can only have an action for the injury. (f)

[*296] *So, as a rule, a commoner cannot distrain the cattle of the lord or terre-tenant *damage feasant*; but if the lord surcharges he may have his action, (g) but see *infra*, § 325; so, if a man has common of estovers, and the lord cuts down all the wood, the commoner cannot take that which is cut, but his proper remedy is his action on the case; (h) but if a man claim all the thorns, &c., growing in such a place, he may take them, though cut down by another. (i)

326. The right of the commoner may by prescription be such as to exclude the lord, for he may have the sole common for a certain time, as after the grass is cut until Lammas-tide, (k) and the better opinion appears to be (although it is not settled,) that if the lord in that case put in more cattle than he ought, the commoner may distrain them *damage feasant*; (l) so, where the land was by custom to be entirely fresh every second year till Lady-day, it was held, that the commoner might distrain the cattle of the

(x) Yelv. 143; Grisell v. Leighe, W. Jo. 12.

(y) 2 Inst. 88.

(z) Cooper v. Marshall, sup. (a) 2 Inst. 38. (b) Mason v. Caesar, 2 Mod. 65.

(c) 1 B. & P. 15.

(d) 1 Roll. Abr. 405, pl. 2, recognised in Cooper v. Marshall, sup.

(e) Cooper v. Marshall, sup., recognised in Sadgrove v. Kirby, sup.

(f) Carill v. Park, 2 Bulst. 116.

(g) 2 Leon. 203; Yelv. 104, 129; Cro. Jac. 208; Brownl. 187; Godb. 182.

(h) Palmer's case, 5 Co. 25; S. C., Cro. El. 820; Noy, 32; Moor. 691, pl. 955; S. P., Woadson v. Nawton, 2 Str. 777; Rackham v. Jesup, 3 Wils. 332.

(i) Dowglas v. Kendall, Cro. Jac. 257; S. C., nom. Dewelas v. Kendall, Yelv. 18; Brownl. 220; Bulstr. 93, 94.

(k) Kentick v. Pargiter, Cro. Jac. 208; S. C., nom. Kenrick v. Pargiter, Yelv. 129; Noy, 130; 2 Brownl. 60; Wheatland and Pain's case, 2 Roll. Abr. 267.

(l) Kentick or Kenrick v. Pargiter, sup.; see also Hall v. Harding, 4 Burr. 2426; S. C., 1 Bl. 673.

lord, because during that season the lord was totally excluded, and had no colour to put any cattle there at all.(*m*)

327. A commoner may distrain *damage feasant* the cattle of a stranger, who has no colour to have his cattle there;(n) so, in the case of an absolutely stinted common in point of number, one commoner may distrain the supernumerary cattle *of another;(o) but where the number is not absolutely certain in itself, and depends upon the number of acres, [*297] there must be an admeasurement of the land, instead of a distress;(o) so, in the case of *levancy* and *couchancy*, and in general when there is colour of right for putting in the cattle, one commoner cannot distrain.(o) See further as to remedies post, § 354 et seq.

328. The rights of the commoner, however limited, may be enforced in all cases where they are liable to be defeated; therefore, if a commoner has a right of common all the year round when the land lies fresh, he cannot be abridged thereof by sowing it oftener than is usual,(p) or by leaving the corn longer on the ground than is necessary;(q) and he will be justified in putting in his cattle.(r)

IV. Alienation of Right of Common.

§ 329. One common convertible into another, or otherwise.	§ 331. Mode of Alienation.
330. What grantable over.	332. What passes under Grants.

§ 329. Commons, like other property, are for the most part alienable, but the rule admits of qualifications, for in the case of common appendant that cannot be converted into common in gross, because it cannot be severed from the land without extinguishment;(s) so, neither common appurtenant where the cattle must be *levant* and *couchant* on the land, for it is then inseparable unless by being extinguished;(t) *but a common appurtenant for beasts certain may be granted over, and so become common, [*298] for such a grant has no connexion of tenure;(u) therefore, where one prescribed in a *que estate* for a fold course, that is, for common of pasture for any number of sheep, not exceeding three hundred, in a certain field appurtenant to the manor of D.; it was held, that he might grant over this fold course, and so make it in gross, for the number of cattle being ascertained the severance is no prejudice to the owner of the land;(x) so, where one

(*m*) 30 E. 3. 27; Trulock v. White, 1 Roll. Abr. 405, 406. (*n*) Godb. 182.

(*o*) Hall v. Harding, sup. (*p*) Trulock v. Rigsby, Yelv. 185; Anon., 12 Mod. 648.

(*q*) 2 Leon. 202; 1 Brownl. 188; Cro. Jac. 271. (*r*) Trulock v. Rigsby, sup.

(*s*) 4 E. 3. 46; 9 E. 4. 39; 26 H. 8. 4, cited 1 Roll. Abr. 401; 1 H. 7. 24; 5 H. 7. 7; Bro. Com., pl. 28; see also Cro. Car. 542; Winch. 45.

(*t*) 19 H. 6. 33, B., cited 1 Roll. Abr. 402; Drury v. Kent, Cro. Jac. 14.

(*u*) 5 H. 7. 7, sup.; Drury v. Kent, sup.; Daniel v. Hanslip, 2 Lev. 67; S. C., 3 Keb. 66.

(*x*) Spooner v. Day, Cro. Car. 432; S. C., 1 Roll. Abr. 402; see 1 E. 3. 1; 11 H. 6. 22; 27 H. 8. 12; Perk. s. 103.

claimed common in gross for a certain number of cattle, or the sole pasture of certain herbage, it was held, that he might license a stranger to put in his beasts; (y) so, where there was a right of common appurtenant for a certain number of cows, and it appeared in evidence that the commoners were in the habit of letting their right and so converting them into rights of common in gross during the time of the letting, no objection was made to this mode of using the property. (z)

330. Although a common in gross *sans nombre*, if enjoyed in fee, may be granted over; (a) *sed secus*, by grantees in tail for life, or for years; for an unlimited license to depasture would be to the prejudice of the other commoners. (b)

Estovers, which are to be spent in a house, cannot be granted over, for they are attached to the place which gives the right to take them. (c) (1)

An uncertain piscary, or a common *sans nombre*, being an indivisible thing, cannot be divided between coparceners, therefore either the eldest sister must take the whole, allowing a compensation to the other, or there must be alternate enjoyment for a stated period. (d)

[*299] *331. Commons are properly transferable by deed, as by grant, bargain and sale, lease and release, (now release alone, 4 & 5 V. c. 21,) and license, or they may be devised; a grant of a common without deed has been held void; (e) (2) so, there can be no demise by parol of a commoner; (f) and a custom to demise a common by parol cannot be supported in law, being an incorporeal hereditament; (g) so, although a man who has an interest in the soil may license another to hunt, or enjoy other like liberties, without deed; (h) yet a license to put beasts into a common can be granted by deed only, *Hoskins v. Robins*, 2 Saund. 328; S. C., nom. *Hopkins v. Robinson*, 2 Lev. 67, and in the latter report of the case it is said that a license *pro hac vice* only is good by parol, but not if it were for a time certain, for that would amount to a lease.

A common *de novo* cannot be created by bargain and sale, for the object of the sale is not in *esse* as it ought to be; therefore where a copyholder having common by custom purchased the freehold of his tenement, with all

(y) *Hoskins v. Robins*, 2 Saund. 327.

(z) *Bunn v. Channen*, 5 Taunt. 244.

(a) 21 E. 4. 84.

(b) *Stampe v. Burgesse*, 2 Roll. Rep. 73; see 1 Ld. Raym. 407.

(c) 22 E. 4. 6; 5 H. 7. 7.

(d) 1 Inst. 164, b, 165, a.

(e) *Farmer v. Hunt*, Yelv. 201; S. C., Cro. Jac. 271; 1 Brownl. 220; S. P., *Tanner and Hobb's case*, 2 Roll. Abr. 63.

(f) *Mountjoy v. Terdrue*, 2 Roll. Abr. 62.

(g) *Lathbury v. Arnold*, 1 Bing. 217; S. C., 8 J. B. Moore, 72.

(h) *Monk v. Butler*, Cro. Jac. 574.

(1) In case of descent they pass to all the heirs; but though they cannot use the right separately, they may by a conveyance vest the right in one person. The same principles apply where the right is annexed to the land. *Van Rensselaar v. Radcliff*, 10 Wend. 639. *S. P. Leyman v. Abceel*, 16 Johns. 30.

(2) The common lands are vested in the proprietaries of the towns, and they may convey to individuals by vote without deed; but if the direction be that the clerk shall make a deed, no title passes without the deed. *Rogers v. Goodwin*, 2 Mass. 477; *Baker v. Fales*, 16 id. 497; *Colburn v. Ellenwood*, 4 N. H. 104; *Pike v. Dyke*, 2 Greenl. 216.

*Eng. Com. Law Reps. i. 92. †Id. viii. 302.

commons thereto belonging, under the words "grant, bargain and sale," held, that this common, being extinguished, could not be revived without a special grant, and that it could not pass by bargain and sale, for that could only be by way of use, which could not be said of a thing created *de novo*.(i)

Commonable rights may be exchanged for land, and a release thereof by the commoner is good, but it must be by deed.(k)

332. Things appendant and appurtenant to land will pass with the land;(l) so, if the lord grant common for beasts, **levant* and *couch-* [*300]
ant upon his manor, or turbary to be spent therein, these will pass by the grant of the manor;(m) or if a stranger grant all manner of estovers, house-
bote, hay-bote, and plough-bote will pass;(n) but a common in gross will not
pass by the name of lands and tenements;(o) so, not under the name of all
pastures;(p) so, where a copyholder for life had a messuage and lands, with
common in the lord's waste belonging thereto, and the lord granted and con-
firmed that messuage, &c., to the copyholder, with the appurtenances, it was
held that the common, being extinct with the customary estate, was not re-
vived by the word "appurtenances;"(q) so, a right of common cannot be
reserved in a demise under the word "land,"(r) see further as to Extinguish-
ment, post, § 335.

V. Apportionment of Common.

§ 333. Common Appendant appportionable.
Common Appurtenant not appportion-
able.

§ 333. Common sans Nombre not appportion-
able.
334. Other Cases of Apportionment.

§ 333. Common of pasture if appendant is appportionable, because it is of
common right, as if A. has common appendant to twenty acres, and enfeoffs
B. of ten acres, the common shall be appportioned and B. shall have common
pro ratâ;(s) so, although the commoner purchase parcel of the land in
which the common is to be had, yet the common shall be appportioned;(t)
and if the land be divided ever so often, each parcel of land is entitled to
common appendant;(u) but it is otherwise in case of common appurtenant,
*for by purchase of parcel of the land, the common is extinct, because
common appurtenant is against common right, and it is the folly of [*301]
the commoner to intermeddle with the part of the land which does not belong
to him;(1) but when the commoner intermeddles only with his own, by ali-
enation of part of the land to which the common is appurtenant, this shall not

(i) *Speaker v. Styant*, Comb. 127; see also *Cro. Jac.* 189.

(k) *Litt. s.* 63; *Co. Litt.* 50, b.

(l) *Lord Gwydir v. Foakes*, 7 T. R. 641.

(m) 1 *Inst.* 121, b.

(n) *Perk. s.* 51.

(o) 20 *Ass. pl.* 9, cited 2 *Roll. Abr.* 57.

(p) 26 *Ass.*, cited *Id.*

(q) *Marshall v. Hunter*, *Cro. Jac.* 253; *S. C.*, nom. *Massam v. Hunter*, *Yelv.* 189; *S. P.*, *Fort v. Ward*, *Moor.* 667, pl. 915.

(r) *Smith v. Milward*, 3 *Dougl.* 70.

(s) *Tyrringham's case*, 4 *Co.* 37 b.

(t) *Ib.*

(u) *Willes*, 230.

turn to his prejudice, because it is not against law ;(x) therefore, where a right of common having been granted to A. (who was seised of lands in S.) and all his tenants in S., for all commonable cattle, and A. conveyed parcel of the lands in S., held, that the alienee was entitled to common on the parcel conveyed.(y)

Common *sans nombre* is not apportionable,(1) as where A. has common of pasture in twenty acres of land and ten of those acres descend to A., the common *sans nombre* being entire and uncertain cannot be apportioned, but shall remain ; but if it had been a common certain, (as for ten beasts), in that case the common should be apportioned ; and so it is of common of estovers, turbuary, and piscary ;(z) for no prejudice can arise to the tenants from common certain being divided or annexed to part of the manor, as they cannot be charged with more than they were before.(a)

334. So, if a man seized of sixty acres, prescribe to have common in other land for all his beasts *levant* and *couchant* upon it, and he make a feoffment of five of these acres, his feoffee shall have common apportionable *pro ratâ*, for the common is joint and several, and no surcharge or other wrong is done to the tenant ;(b) so, if a commoner prescribing to have common in two yardlands for four beasts, &c. *after severance of the [*302] common, and to have common all the year when the land is not sowed, afterwards lease one of the yardlands for years, the lessee shall have the same common *pro ratâ* ;(c) so, if he who has common appurtenant to land, demise a part of the land to another, the lessee shall have common for the beasts *levant* and *couchant*.(d)

VI. Extinction of Commons.

§ 335. When Extinction takes place.

1. By Unity of Possession.

336. Common Appendant.
What Estates.

337. Exceptions to the Rule.

338. Common Appurtenant, when extin-
guished.

339. Common in Gross.

2. By Severance.

340. What will cause a Severance.

(x) Hob. 235 ; Wild's case, 8 Co. 79 ; Kimpton and Bellamy's case, 1 Leon. 43 ; S. C., Gouldsb. 53 ; Cole v. Foxman, Noy, 30 ; see also Hutt. 58 ; Winch. 45 ; 2 Brownl. 298.

(y) Saheverill v. Porter, Cro. Car. 482.

(z) 1 Inst. 149, a ; Cro. Car. 432 ; Ow. 122. (a) 1 Roll. Abr. 232.

(b) Wood v. Moreton, 1 Brownl. 180 ; S. C., nom. Morton and Wood's case, 1 Roll. Abr. 235.

(c) Wood v. Moreton, 1 Brownl. 180 ; S. C., nom. Morton and Wood's case, 1 Roll. Abr. 235. (d) Wildman's case, 8 Co. 79.

(1) Nor of estovers. Van Rensselaer v. Radcliff, 10 Wend. 650. Sed vide contra, Livingston v. Ten Broeck, 16 Johns. 25, 26.

3. *By Release.*

§ 341. What kind of Release operates an Extinguishment.

4. *By Approvement or Inclosure.*

342. Where Inclosure operates an Extinguishment, or otherwise.

5. *By Dissolution of the Estate.*

343. Determination of Corporation.
Enfranchisement.

	344. Exceptions to the Rule as to the Enfranchisement.
344. Relief in Equity.	

§ 335. An extinguishment of commons takes place in case of unity of possession, by severance from the land to which they belong, of a release by the commoner, of approvement and inclosure, and of dissolution of the estate to which they are attached.

*1. *By Unity of Possession.*

[*303]

336. A common may be extinguished when the whole of the land to which the common is appendant, is united with that in which the common is taken; (1) for, in that case, a man has as high and perdurable estate in the thing claimed, as in the land out of which it is claimed; (e) therefore, where an abbot had common in the lands of another abbot appendant to his own abbey, and both the abbeys at the dissolution of the monasteries came into the hands of the king, by such unity of possession the common was held to be extinct; (f) but if the estate in the land to which the common is annexed is not so high and perdurable as that where the right of common exists, it is not such a unity of possession as to extinguish the common; (g) and it must be not only as high, but also equally perdurable, see *infra*, § 337.

337. So, where the common is annexed to a customary tenement, parcel of a manor, a right of common will, it seems, in that case survive, so that the lord may not be prejudiced; therefore, as in the case of a common appendant, where, if a tenant of a manor purchased a seignory, and then granted over the tenancy, held that the common which he had before should still be appendant, for it was not extinguished by the unity, but should pass with the tenancy, though otherwise of a common in gross; (h) so, where a copyhold tenement was seized into the hands of the lord, who re-granted it as copyhold, the right of common was held not to be extinct, and that, as long as the tenement to which it belonged was demisable by copy of court-

(e) *Tyringham's case*, 4 Co. 33 a, citing 24 E. 3, 25, and overruling 14 Ass. pl. 20; 15 Ass. pl. 2; see also *Bro. Extinguishment*, pl. 19. 27; 2 Sid. 111; 4 Mod. 363.

(f) *Nelson's case*, 3 Leon. 123.

(g) 1 Inst. 313, b.

(h) *Jourdan v. Atwood*, Ow. 122.

roll, it would remain ;(i) so, if the lord of a manor *alien his waste, [*304] the copyholder's right of common is not gone, although the commonable soil is divested from his person ;(j) so, where there was a manor in the king's forest, and the lord and the tenants had common in the wastes of the forest, and also in the lands of the freeholders, and at the dissolution the manor came into the king's hands, by this unity of possession the common was extinct as to the lord, though not as to the copyholder.(k) If only part of the land is purchased by the commoner in which the common is, it is extinct only for that part, because common appendant is apportionable, see ante, § 333.

338. Common appurtenant cannot, like common appendant, be extinct for part, and in esse for part, by act of the parties, (see supra, § 337,)(l) ; therefore, if a commoner purchases parcel of the land in which he has common appurtenant, this extinguishes all the common,(m) common appurtenant not being apportionable like common appendant ;(n) so, common appurtenant to house and land is extinguished by purchase of the land.(o)(1)

339. Where the whole waste, in which common in gross *sans nombre* is, comes by purchase to the commoner, it is lost ;(p) therefore, where an abbot had a common in gross *sans nombre*, which, on the dissolution of the abbey, became united to the crown, by such unity of possession the common was destroyed, and could not be revived in the hand of the patentee, for then any man that had any part of the abbot's possessions would have as great a common as the abbot himself had, and the king's land might be infinitely *surcharged ;(q) and if one who has common in a great field [*305] in which many have land, purchase an acre from one of them, all his common will be extinct ;(r) but it has been said that common *sans nombre* in gross cannot be extinguished by purchase of parcel of the land ;(s) and shack or mutual common will not be extinguished by uniting of possession, because, as is said, it is for the public good that it should be used without inclosure.(t) Extinguishment is properly produced by the act of the party, for by act of law there will be no extinguishment, as the law works no injury.(t)

2. By Severance.

340. Commons are likewise destroyed by severing them from the tenement to which they are appendant or appurtenant, as where one aliens the

(i) *Badger v. Ford*, 3 B. & A. 153.

(j) 18 Ass. pl. 4. (k) *Itin. de Waltham*, W. Jo. 349. (l) *Tyrringham's case*, sup.

(m) *Dy.* 339 ; *Wild's case*, 8 Co. 79 ; *Morse v. Webb*, 1 Brownl. 180 ; 2 Brownl. 297.

(n) See *Kimpton's case*, *Gouldsb.* 53 ; S. C., nom. *Kimpton v. Bellamy*, 1 Leon. 44 ; S. C., nom. *Rampton's case*, cited *Cro. El.* 594 ; S. C., *And.* 159, pl. 203 ; see also ante, § 333. (o) *Bradshaw v. Eyre*, *Cro. El.* 570. (p) 7 H. 6, 3.

(q) *Sawyer's case*, W. Jo. 286 ; S. C., cited 3 Salk. 93. (r) 18 E. 3, 44 ; 11 Ass. pl. 4.

(s) 1 Ld. Raym. 107.

(t) *Kimpton's case*, sup. § 338.

(1) *Ante*, 301, n. 1.

•Eng. Com. Law Reps. v. 247.

tenement excepting the common right attached to it ;(*u*) so, if a man seised of land to which common is appendant, be disseised of the common, and afterwards enfeoff another of the land, the common is extinct forever ;(*x*) so, if a house be destroyed to which common of estovers is attached the right is gone ;(*y*) but, enlarging a house, or building new chimneys, will not cause a loss of the right ;(*z*) nor will the right be destroyed by the act of God, for this prejudices no man ;(*z*) so, the act of the lord, independent of the commoner, will not operate to the prejudice of the latter, as where a manor was granted to A., with a reservation of trees, and A. granted a copyhold estate for life, it was held, that notwithstanding the reservation, the tenant might take the loppings.(*a*)

*3. By Release.

[*306]

341. It has been held that a release of common in one acre is a release of all ;(*b*) but in *Cole v. Foxman*,(*c*) the Court held it not to be extinguishment, but that the common was in that case apportionable, so that it should be no prejudice to the terre-tenant ; and so, in *Benson v. Chester*,(*d*) it is said, that "a release by one commoner of his right over one part of the common may possibly operate as a release of his right over the whole, but if that were the consequence of a release by all the commoners, there would long ago have been an end of all the rights of common throughout the kingdom."(*e*)

4. By Approvement or Inclosure.

342. Approvement by the lord, operating to exclude the commoner from the improved part, is an extinguishment of common as to that part ;(*g*) but if the commoner purchase a part which is approved, his common shall not be extinct in the residue : therefore, where one had common appendant to his tenement, and the lord improved a part of the waste, leaving sufficient common for the commoners, and afterwards enfeoffed the commoner of the improvement, held that this did not extinguish his common in the residue.(*h*)

In common *pur cause de vicinage* if one inclose part, it is an extinguishment of all the common ;(*i*) and it is the same if but one acre be inclosed ;(*k*) but to effect an entire extinguishment of this common, there must be such an inclosure as will prevent the cattle from straying from one field to the other.(*l*) In *Bradshaw v. Bokenham*,(*m*) it is said, that if a commoner incloses part of the waste in which he ought to have [*307] common, it is extinguished ; but in *Bradshaw's case*,(*n*) the right of common in such case is suspended. As to the effect of inclosures under Inclosure Acts, see Dig. P. ii. tit. Common (Inclosure.)

(*u*) 1 Roll. Abr. 401 ; see also *Revell v. Joddrell*, 2 T. R. 415 ; *Doe v. Davidson*, 2 M. & S. 175.

(*x*) Bp. of London's case, 1 Roll. Abr. 935.

(*z*) *Luttrell's case*, 4 Co. 86.

(*a*) *Swayne's case*, 8 Co. 63 ; S. C., 231 ; see also, *Hob. 43*.

(*b*) *Morse v. Webb*, 1 Brownl. 180 ; *Wood v. Moreton*, Id. (c) *Noy*, 30.

(*d*) 8 T. R. 401.

(*e*) Per Ld. Kenyon, C. J.

(*g*) See ante, § 336.

(*h*) Dy. 399, pl. 45.

(*i*) *Bacon and Palmer's case*, 4 Co. 37 ; S. C., 1 Brownl. 174.

(*k*) *Harding v. Brookes*, 3 Keb. 24.

(*l*) *Gullett v. Lopez*, 13 East, 348.

(*m*) *Noy*, 186, citing 11 H. 6, 22 ; 19 H. 6, 11.

(*n*) 1 Roll. Abr. 938.

5. *By Dissolution of the Estate.*

343. If the estate be dissolved to which the common is attached, the common will go with it, as if a corporation having common in gross be determined, the right is extinct; (o) so, if the inhabitants of a vill claim common as appendant to an ancient messuage, and any one builds a new house or destroys the ancient messuage, the common is gone; (p) so, by enfranchisement, the common is extinguished, for common which was first gained and annexed to a copyhold by custom, will be lost when the copyhold is extinct by enfranchisement, for common is not in its own nature incident to a copyhold estate, but a collateral interest gained by usage; therefore, where a copyholder of a messuage and land for life, had common in the lord's waste, and the lord granted and confirmed the said messuage and lands with the appurtenances to him and his heirs, it was held that he should still not have common, for the estate to which the common was annexed, was destroyed by his own act, for in accepting the freehold, the common was also destroyed, (q) unless there be special words of grant, as if a copyholder hath common in the waste, and the lord enfeoffs him of the copyhold "with all pastures and commons whatsoever to the said messuage or tenement belonging, used, or *enjoyed therewith," the common is preserved, [*308] because the intent is clear that a like common should be granted as he had before; (r) but when the lord grants and confirms the copyhold lands with the word appurtenances, it was held that the common was not saved by the general word "appurtenances," because the common is not appurtenant to the freehold granted by the lord to which these words must be supposed to refer, (s) and the word "appurtenance" is not sufficient to pass the common; (s) so where a copyholder had used to take estovers to repair the hedges, and the lord granted to him the freehold by the words "all the lands and tenements thereunto appertaining," it was nevertheless held that he should not have common in the land of the lord. (t)

344. A distinction has, however, been taken, when the wastes in which the copyholder has common, are within the manor or out of the manor; therefore, where copyholders had common in the soil of a stranger, it remained notwithstanding the enfranchisement of the land, and should be enjoyed by all the tenants of the land, as it had been before by the copyholders. (u) And it is said, "that where a copyholder claims common in the waste of the manor, it properly and strictly belongs to his estate as copyholder, and if he enfranchises his copyhold his common is lost; but where he claims it out of the manor, it belongs to the land and not to the estate; and if he enfranchises the estate, yet the common continues." (x)

But where one had two manors, Dale and Sale, and the copyholders of Dale had used, time out of mind, to have common in the manor of Sale, *et*

(o) 27 H. 8. 10.

(p) *Costard v. Wingfield*, 2 Leon. 44.

(q) *Marshall v. Hunter*, Cro. Jac. 253; *S. C.*, nom. *Massam v. Hunter*, Yelv. 189; *S. C.*, *Darson v. Hunter*, Noy, 136; see also *Hob.* 190; 1 *Brownl.* 220; 2 *Brownl.* 209; 1 *Bulstr.* 2.

(r) *Worley's case*, 2 And. 168.

(s) Yelv. 189, see *supra*, n. (q).

(t) *Fort v. Ward*, Moor. 667.

(u) *Packman v. Cole*, 2 Sid. 84.

(x) *Per Holt, C. J.*, *Crouther v. Oldfield*, *S. C.* nom. *Crowther v. Oldfield*, 2 *Ld. Raym.* 1225.

e contra; and the lord sold both the manors, and afterwards the copyholders of the *manor of Dale died, and others were admitted, it was held that they could not claim the common which the other had, for it [*309] was extinguished by the alteration.(y)

In cases of this kind, however, it appears that parties may have relief in equity; therefore where the lord of the manor enfranchised a copyhold with all the commons thereto belonging, it was held, that although the common was extinct at law, yet it subsisted in equity, and it was decreed, that the plaintiff should have the same right of common as belonged to the copyhold.(z)

VII. Suspension of the Right of Common.

§ 345. What it is, and when it happens. | 346. Other Cases of Suspension.

§ 345. In some cases the common will be lost for a time only, or, as it is termed, will be suspended, as where a commoner takes a lease of one acre out of which his common issues, the whole of his right is suspended during the term;(a) so, if a commoner inclose part of the waste in which he feeds his cattle, his right was held thereby to be suspended;(b) so, if he disseised his lord, the common was suspended during the disseisin.(c) So, if the commoner were disseised, his common should cease until he had recovered his seisin, that the common might not be doubly charged.(d)

346. So, where the common is not extinguished by reason of the inequality of the estates, a suspension only is *the consequence, as where a parson had common appendant to his parsonage out of [*310] abbey lands, and the parsonage was afterwards appropriated to the abbot and his successors, it was held that the abbot had not an estate of equal duration in the one as in the other, for the parsonage may be disappropriated, and then the parson shall have common again;(e) so, where common was annexed to certain tenements, parcel of the abbey of Sarum, which came to H. 8, at the dissolution, and the Duchy of Cornwall, in which a common H. was at that time also in the possession of H. 8, so that hereby there was unity of possession, both of the tenements to which the common of pasture appertained, and of the H. common, yet it was held that this was not such a unity of possession as would work an extinguishment, for the king had only a base fee in the Duchy of Cornwall, being in only for want of an heir, but he had a fee simple in the H. common, therefore the common was only suspended;(f) so, if a copyholder as such has a right of common in an adjoining manor, and he purchases that manor, it would not extinguish forever the

(y) Gryme's case, 1 Bulst. 19, *sed quare*.

(z) *Styant v. Staker*, 2 Vern. 250; see also 6 Mod. 19, 20.

(a) 11 H. 6. 22 a. b, cited 9 Co. 135.

(b) *Bradshaw's case*, 1 Roll. Abr. 938.

(c) 16 H. 7. 11, cited Bro. Com. pl. 12.

(d) 19 H. 6. 33.

(e) *Anon.*, Godb. 4.

(f) *R. v. Hermitage (Inhab.)* Carth. 241.

right of common incident to his copyhold, because that would prejudice the lord.(g)

VIII. Revival of Commons.

§ 347. In what Cases.

| 347. What amounts to a new Grant.

§ 347. Common though extinguished for a time may nevertheless not be wholly lost, but will afterwards revive, and this may happen not only in the cases of suspension before mentioned, but also in some cases of a new grant; therefore, where the suspension takes place during a term, it was held [*311] that the commoner who made the lease might claim the common generally by prescription, for the suspension respected the possession only, and not the right, and the inheritance of the common, therefore, still remained, and where prescription or custom makes a title of inheritance, the party cannot alter or wave it by matter *in pais*;(h) so, although a grant of all common belonging or appertaining to land was held not to revive a common which had been extinguished by unity of possession; yet if the grant had been of all commons used therewith, it would have amounted to a new grant;(i) but a user on the part of the occupier must be proved, otherwise the common will not pass;(k) so if a copyhold to which common belonged escheat, and the lord grants it with all common appurtenant, it was held that the grantee should have common, although the ancient common was extinct. for it operated as a new grant;(l) so, a grant of Himley-Hall, and all lands, tenements, and hereditaments thereto belonging, or therewith occupied and enjoyed, in like manner as A. had enjoyed them, the old common having been extinguished by unity of possession, this was holden to revive the common, and it should be intended that this was a feeding, and should be the same as the tenant A. had had.(m)

[*312] *IX. Injuries to Right of Common, and their Remedies.

§ 348. Disseisin.

Disturbance.

349. Remedy for Disseisin formerly.
Remedy remaining.

350. Distress.

Drift of Cattle.

Injuries in respect to Fences.

Maleicious Injuries.

351. Jurisdiction of the Leet.

Jurisdiction of the Court of Chancery.

352. Disseisin.

353. Disturbance of Commoner by the
Lord, &c.

§ 354. Remedies.

By the Party's own Act.

355. When applicable, or otherwise.

356. By Action on the Case against
Lord.

357. Not by Trespass.

Nor by Indictment.

358. Remedies of one Commoner against
Another.

359. Remedies of Commoner against
Strangers.

Disseisin of Election.

Distress.

(g) Arg. 2 T. R. 421, 422.

(i) Clements v. Lambert, 1 Taunt. 205.

(k) Bradshaw v. Eyre, Cro. EL. 570. (l) Worledge v. Kingswel, Cro. EL. 794.

(m) Gargrave v. Gargrave, 2 Brownl. 52. See also Hob. 131; Sandeys v. Oliff, Moor. 467, pl. 663; Clements v. Lambert, sup.

(h) 1 Inst. 114, b.; 9 Co. 135.

§ 348. Injuries to the right of common and their several remedies, are such as effect the lord and the commoner.

1. *Affecting the Lord.*

The civil injuries affecting the lord are either disseisin or disturbance. Disturbance is any act by which the right of another to his common is incommoded or diminished.⁽ⁿ⁾ Disturbances are of different kinds, as when one having no right puts cattle on the lord's waste,^(o) or one having a right either puts cattle which are not commonable,^(p) or puts more cattle on the waste than the herbage will sustain, or the party has a right to place there, which is called surcharging,^(q) or encroaching on the waste by inclosure or otherwise.^(r)

349. The remedy for disseisin is ejectment, and that is the only remedy since the abolition of the assize of novel disseisin by the 3 & 4 W. 4, c. 27, s. 36 (see Dig. P. iii. tit. Limitations;) but before that act [*313] abolishing a writ of right the lord was barred his remedy by ejectment by an adverse possession of twenty years, and must have had recourse to a writ of right,^(s) and now in that case he is barred from bringing any action.

The remedies for disturbance are either by action, writ of admeasurement, or distress.

The lord might (before the 3 & 4 W. 4, c. 27, s. 36, abolishing real actions) have brought a *quo jure* against a claimant putting in his cattle, but now he may bring either an action of trespass or a special action on the case, which in practice had long superseded the former writ.

Another remedy for surcharge was a writ of admeasurement whereby the number and description of cattle might be reduced within their proper bounds.^(t) This writ lies either where a common appurtenant or in gross is certain as to number, or where a man has common appendant or appurtenant to his land, the quantity of which has never yet been ascertained;^(x) this remedy, though deemed to be the most effectual, has in practice given way to the more summary and expeditious remedies by trespass or action on the case.

The lord may maintain an action for every trivial trespass, because of the entry and trespass, although it is otherwise with the commoner;^(y) and it is not necessary that the owner of the soil should be actually in possession to enable him to maintain an action;⁽¹⁾ therefore, where a reversioner sued his tenant, lessee of the manor, for wrongfully inclosing parcels of the common, held that the action was well brought.^(z)

(n) 3 Comm. 237.

(p) See ante, § 307.

(s) Creach v. Wilmot, 2 Taunt. 160, n.; S. P., Hawke v. Bacon, 2 Taunt. 156.

(t) Bract. 229; Flct. 262; Britt. 148.

(x) 3 Comm. 238; see also 2 Inst. 86; 1 Fitzh. N. B. 125, D.; 1 Roll. Rep. 365; 2 Ld. Raym. 1187.

(y) See post, § 356; 3 Comm. 237.

(z) Oxford (Queen's College, &c.) v. Hallett, 14 East, 489.

(o) See ante, § 317.

(q) 2 Lev. 87.

(r) 14 East, 489.

(1) Unless it be trespass. First Parish v. Smith, 14 Pick. 297.

[*314] *350. In the case of strangers putting in their cattle, there is no question as to the lord's right to distrain them *damage feasant*; (a) so, where the number of beasts which a commoner may depasture is limited, it is also settled that the lord may distrain; (b) but where the commoner had a right of pasture for one ox only, and put on two, it was held, that the lord could only take the ox put on last, but if put on together then he might have his choice; (c) but see on this point *Hall v. Harding*. (d) It was held formerly that, in the case of appendancy the lord could not resort to this remedy until the common had been admeasured; (e) so, it has been said that the lord could not distrain a commoner's cattle whose right was regulated by *couchancy* and *levancy*; (f) and so, where a man turns on his cattle under some colour of right, the lord cannot distrain, *sed secus* where he has no right; (g) so, the lord may drive the cattle of the commoner with those of a stranger to pound upon the common, in order to sever them, without a custom for so doing; (h) and if the cattle of a stranger be on the common he may drive them out or impound them; (h) and if the common be surcharged, he may detain the cattle till satisfaction for the trespass without a prescription; for distress is incident to the drift of a common, being a thing of common right for the preservation of the common. (i) As to the drift of a common, see Dig. P. i. ii. tit. Common.*

As to the injuries to the lord's estate for the want of fences, there is an old writ entitled *curia claudenda*, now disused, when a neighbour neglected to inclose his land, but this is now dealt with as other nuisances; [*315] see further as to *remedies post, tit. INJURIES TO THINGS REAL. Malicious injuries to fences generally are provided for by the Malicious Injuries Act 7 & 8 Geo. 4, see Dig P. i. tit. Malicious Injuries.

351. As a rule, injuries to the lord's waste cannot be inquired of at a leet, held, therefore, that an amercement for putting geese on a common could not be distrained for under the authority of such a court; (k) so, a presentment at a leet for digging coney-burrows has been quashed; (l) but the by-laws of a leet may be enforced where there is a custom for so doing. (m)

The jurisdiction of the Court of Chancery has been exercised in respect to commons, not only in enforcing agreements respecting inclosures, and in aid of the lord's power to approve, (n) but also by injunction in restraining excessive improvements; (o) preventing injuries to young trees by the commoners' cattle; (p) so, in cases of excessive use of turbary, (q) and other

(a) See ante, § 317.

(b) *Dixon v. James*, 1 Roll. Abr. 665; S. P., *Ellis v. Rowles*, Willes, 633.

(c) *Ellis v. Rowles*, sup.

(d) 4 Burr. 2426.

(e) *F. N. B.* 125, D.

(f) 3 Wils. 126.

(g) *Ib.*; see also *Sloper v. Allan*, 1 Brownl. 171; S. C. 2 Roll. Abr. 706; *Dixon v. James*, 1 Freem. 273; 2 Saund., Wms. ed., 323.

(h) *Thomas v. Nichols*, 3 Lev. 41.

(i) *Bromfield v. Teigh*, 2 Lev. 87.

(k) *Wormleighton v. Burton*, Cro. El. 443.

(l) *Ayres' case*, T. Raym. 160.

(m) *Excester (Earl) v. Smith*, 2 Keb. 367.

(n) *Daniel v. Ardern*, Toth. 118, and other cases; see Woolr. L. of Com. c. xxv.

(o) *Trigg v. Payte*, Toth. 175.

(p) *Weeks v. Staker*, 2 Vern. 301; *Arthington v. Fawkes*, 2 Vern. 356; *Anon. Gilb. Eq. Rep.* 183; S. C., *Eq. Ca. Abr.* 207.

(q) *Richards v. Noble*, 3 Mer. 373.

like matters, but equity will not interfere where the plaintiff has clearly his remedy at law. (r)

2. *Injuries affecting the Rights of the Commoner, and their Remedies.*

352. Injuries to the rights of the commoner may be either by disseisin or disturbance.

Where a commoner is ousted of common appendant or *appurtenant, whether of pasture, estovers, or other, his remedies were [*316] (before the 3 & 4 W. 4, c. 27, s. 36, abolishing assizes) by an assize of novel disseisin, or by ejectment, (s) but now by ejectment only; and the party injured will recover seisin of estovers, although the owner has stubbed up the wood, so that there can be no more; (t) and as to when assize might be brought and when ejectment, see 1 Freem. 447; 3 Keb. 738; 1 Str. 54; Adams on Ejectment, 19. 292; also further post, INJURIES TO THINGS REAL.

353. A commoner may be disturbed in the enjoyment of his common either by the lord, or by another commoner, or by a stranger. The injuries which he suffers from the lord are either an undue improvement, or making undue erections, or surcharging the common, wrongful distress, obstructing the way to the common, and the like. As between one commoner and another, the most common injuries complained of are surcharging the waste, taking unreasonable estovers, digging pits, and the like. The commoner may be disturbed by a stranger, either by his putting on cattle when he has no right so to do, or by digging or carrying away stones, clay, &c.

354. The remedies which the commoner has are either by his own act, by action, or by distress.

If the lord approves without leaving sufficient common, the commoner may break down the whole inclosure; (u) (1) but a distinction has been taken where the commoner is entirely excluded from his common by the lord, and where he is only abridged of his right, for in this latter case he cannot abate the nuisance or redress himself by his own act; (x) *and an information has been granted against copyholders for pulling down [*317] inclosures when there were sufficient gaps for them. (y)

So, where there is an excess of coney burrows, or other holes or pits on the common, the commoner cannot himself remove the nuisance, not even although his cattle fall into the pits, for he can neither kill the coney or fill up the pits, his remedy in that case being only by action. (z)

It has indeed been said that a commoner might fill up pits made by a stranger; (a) but see contra, 1 Brownl. 228, also ante, § 323. It is, how-

(r) *Fines v. Cobb*, 2 Vern. 116; ——— *v. Palmer*, Mos. 169; S. C., Eq. Ca. Abr. 207; *Dench v. Bampton*, 4 Ves. 708. (s) *Mary's case*, 9 Co. 112; Hob. 43.

(t) Hob. 43. (u) 2 Inst. 88.

(y) *R. v. Wyvill*, 2 Mod. 66.

(z) *Anon.*, 2 Leon. 201; *Coney's case*, Godb. 122.

(a) *Howard v. Spencer*, 1 Keb. 834.

(1) Or take estovers in any other land of the lord, if he make a colourable lease to deprive the tenant of his rights. *Van Rensselaar v. Brice*, 4 Paige, 174.

ever, settled, that although the commoner may not kill the coney put on the common by the lord, yet he may kill those that are bred in a neighbour's land, and cannot therefore maintain an action against the owner of the conies, *(b)* for conies being *feræ naturæ* no one has any property in them. *(c)*

355. So, if the lord sells the trees so that the commoner is deprived of his estovers, he may have his action, but he cannot by his own act redress the wrong; therefore, where one had a common of estovers in the wood of another, he could not take away any part of that which was cut, but should be put to his action; *(d)* and this applies to what is done by others as well as by the lord; the commoner cannot himself remedy his own wrong, therefore he cannot justify dispersing the ashes cut and burnt by a stranger, who has a colour of right, for by cutting and burning them he has a property therein. *(e)*

[*318] 356. The proper and usual remedy for a commoner as ^{*}against the lord or another commoner is by action on the case; but he cannot have an action for every trespass, for if it be so small that he has not any loss, but sufficient common remains for him, then he shall not have any redress. *(f)*

357. So, a commoner cannot, like the lord, have an action of trespass, for he has no ownership in the soil, 22 Ass. pl. 48, cited Bro. Com. pl. 24, *Smith v. Kemp*, *(g)* although in this latter case, which was trespass for taking fish in a free fishery, the plaintiff had judgment, on the ground, that it should be intended that they were the plaintiff's own fish. In another case, where the lessee of a copyholder for life brought trespass *vi et armis*, for breaking his close and cutting his trees, it was held that the copyholder was as much tenant of the trees as of the land, and that if H. has all the thorns in such a place for estovers, he may maintain trespass against any one that cuts them, even his grantor, and in such case need not aver that he burnt them; *(h)* this decision was affirmed in the Exchequer Chamber, but reversed by the Lords, on the ground that the tenant could not cut them; and if the lord could not, then they must rot on the ground. *(h)*

A commoner can, however, in no case proceed by indictment against the lord, but by action only. *(i)*

358. As to the remedies of one commoner against another, he may have a writ of admeasurement, an action on the case, or a distress against his fellow commoner, according to the circumstances.

If a man be disturbed by another, who has an equal right with himself to the profits of the land; either by surcharging the wastes, taking unreason-

(b) *Bowlston v. Hardy*, 5 Co. 104; S. C., Cro. El. 547; S. C., Moor. 453.

(c) *Hinsley v. Wilkinson*, Cro. Car. 387.

(d) *Spilman v. Hermitage*, 1 Roll. Abr. 406.

(e) *Rackham v. Jesup*, 3 Wils. 332, recognising *Basset v. Maynard*, Cro. El. 819, and *Woodson v. Newton*, 2 Stra. 777. *(f)* 9 Co. 113. *(g)* 4 Mod. 186.

(h) *Ashmead v. Ranger*, 2 Salk. 638; S. C., 1 Ld. Raym. 551, Com. 71; 11 Mod. 18; 12 Mod. 380; Holt, 162; Fort. 152. *(i)* *Willoughby's case*, 2 Leon. 117.

able estovers, turbary, and the *like, an action on the case is now [*319] usually preferred to a writ of admeasurement.

In the case of surcharging the waste, it is no objection to one commoner bringing an action against another, that he himself has surcharged the common; for if A. infringe the right of common of B., it is necessary that B. should have A.'s right ascertained, otherwise his wrongful act would in process of time become evidence of his right. (*k*)

If a writ of admeasurement be sued, he cannot take the cattle of a fellow commoner before the admeasurement, although he may afterwards, for "where there is a colour of right for putting in the cattle a commoner cannot distrain, because it would be judging for himself, in a question that depends upon a more competent inquiry; but where cattle are put upon the common without any colour or pretence of right, the commoner may distrain them, and therefore he may distrain the cattle of a stranger." (*l*) But this rule with regard to distress as between commoners may be superseded by special agreement; therefore, where there was a mutual agreement between the plaintiff and defendant that neither should turn any sheep or other cattle loose into certain fields for twelve years, held that this was a release or extinguishment *pro tempore* of the plaintiff's right, and might have been pleaded as such. (*m*)

359. A commoner as against a stranger may have an ejectment, an action on the case, or a distress.

If a stranger eat the common of a freeholder, the latter may consider it as a disseisin and bring his action accordingly, for a disseisin of common is the taking away of the profits of the common; (*n*) and a copyholder may have an action on the case for a like injury; (*o*) so, where clay was dug by a stranger, held that an action on the case would *lie; (*p*) but when [*320] clay has been dug, or grass cut by a stranger, it is not competent for the commoner to carry them away, because when once severed he has no property therein; (*q*) and the stranger has by cutting them such a property therein that the commoner cannot intermeddle with them; and therefore, where a stranger had burnt a load of ferns to ashes, the commoner was held not justified in scattering the ashes, (*r*) see ante, § 355.

The proceeding by distress against a stranger was recognised in an early case, (*s*) and has since been established by many decisions; (*t*) and the cattle of a stranger may be distrained *damage feasant*, whether they have escaped into the common or have been put in there; (*u*) and when a common of piscary is disturbed, the commoner may distrain nets, oars, tackle, &c., *damage feasant*, (*x*) see further as to remedies post, INJURIES TO THINGS REAL AND THEIR REMEDIES.

(*k*) *Hobson v. Todd*, 4 T. R. 71.

(*l*) Per Lord Mansfield, C. J., 4 Burr. 2426.

(*m*) *Whiteman v. King*, 2 H. Bl. 4.

(*n*) *Crogate v. Morris*, 1 Brownl. 197.

(*o*) *Terry v. Goodier*, 1 Roll. Abr. 89.

(*p*) *Bullen v. Sheene*, Godb. 343; S. C., 2 Roll. Rep. 308; Palm. 366.

(*q*) *Stile v. Butts*, Cro. El. 434.

(*r*) *Rackham v. Jesup*, 3 Wils. 332.

(*s*) 15 H. 7. 12, cited Bro. Com. pl. 39.

(*t*) F. N. B. 128; 9 Co. 112; Godb. 123; Yelv. 104; 2 Brownl. 148; Sty. 4629; 1 Freem. 273; 2 Lev. 252.

(*u*) *Morris' case*, Godb. 185.

(*x*) *Reynell v. Champnoon*, Cro. Car. 228.

SECTION VII.

RIGHT OF WAY.

§ 360. The distinction between different ways and the property which may be had in them have already been considered under the head of corporeal hereditaments.^(y) The incorporeal right known by the name of *right of way*, the subject of the present section, comprehends—

1. The nature of the right and its extent.
2. How claimed.
- [*321] *3. User of the right.
4. Extinguishment of the right.
5. Suspension and revival of the right.
6. Disturbance or interruption of the right.

I. Nature of the Right and its Extent.

§ 361. Definition.

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362. Appendancy.

§ 361. Is an Easement.

§ 361. A right of way is a privilege which an individual, or particular persons, such as the inhabitants of a particular place, or the owners or occupiers of a particular house or parcel of land, have of going over another person's grounds.⁽¹⁾ It is one of the most important of incorporeal hereditaments, in which one man has an interest and a right, though another man be the owner of the soil where it is claimed.⁽²⁾

A right of way is simply an easement or a privilege that confers no interest in the land,^(z) as distinguished from a right to take something out of the soil, which is a profit *à prendre*.^(a)

362. In *Godley v. Frith*^(b) it was held, that a right of way cannot, like a common, be pleaded as appendant, for it is an easement, not an interest; but in *Beaudely v. Brook*,^(c) when land was granted with a way thereto, this was held to be *quasi* appendant to it, and a thing of necessity; so, the present form of pleading is “as to the said close belonging and appertaining;” see further as to pleading, post, INJURIES TO THINGS REAL AND THEIR

(y) See ante, § 102 et seq.

(z) *Hewlins v. Shippam*, 5 B. & C. 221; ^b S. C., 7 D. & R. 783.

(a) *Manning v. Wasdale*, 5 Ad. & Ell. 764; ^c S. C., 1 Nev. & Per. 172; see also *Blewett v. Tregoning*, 3 Ad. & Ell. 554; ^d S. C., 5 Nev. & Man. 308; *Bailey v. Appleyard*, 3 Nev. & Per. 257.

(b) *Yelv.* 159.

(c) *Cro. Jac.* 190.

(1) *Rowland v. White*, 1 Bailey, 58. *Lazaretto Road*, 1 Ash. 421.

(2) And an injury to the right is not within the jurisdiction of a justice, having no jurisdiction where the title to real estate is pleaded. *Spear v. Bicknell*, 5 Mass. 129.

¹Eng. Com. Law Reps. xi. 207.

^cId. xxxi. 433.

^dId. xxx. 151.

REMEDIES; so, in an early case it was held that an easement can be claimed only in respect of some tenement; therefore, when one granted to *another a way over his land, to a certain mill, of which the grantee was not seised at the time of the grant, he could not have maintained an assize for any disturbance, because he had not the frank tenement to which he claimed to have the way; (*d*) and the purchase of the frank tenement afterwards would not have enabled him to bring this action; (*d*) so, in another case, if one have a way appendant to his manor or house, he cannot enjoy it, unless in respect of the manor or house, for the appendancy is unalterably attached to that to which it is appendant; (*e*) so, a way appendant cannot be afterwards turned into gross, because it is inseparably united to the manor or land to which it is incident; (*f*) and if a way in gross be granted, the grantee cannot grant it over, because it is attached to the person; (*g*) see further, *infra*, § 363 et seq., as to the claiming of a right of way.

II. *How claimed.*

1. *By Prescription.*

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| § 363. Prescribing in a que Estate.
Who cannot prescribe. | § 364. What can or cannot be prescribed
for. |
| 365. Setting out the Termini. | |

2. *By Grant.*

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| 366. What is a Grant.
When the Way passes in a Grant.
Way appendant or in gross. | 368. In other Cases.
369. Extent of the Grant in favour of
the Grantee. |
| 367. Construction of Grants.
Against the Grantor. | 370. Construction against the Grantor. |

3. *By Reservation*

371. Construction of Reservations.

*4. *By Custom.*

[*323]

- § 372. What a good Custom.

5. *By Necessity.*

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| 373. In case of a Grant.
In case of a Reservation.
Grant by a Trustec. | 374. Other Cases of a Way by Necessity.
Extent of the Right. |
| 375. Old and New Way. | |

§ 363. There are five ways of claiming this right, that is, by prescription,

(*d*) 21 E. 3. 2, pl. 5.
(*g*) 7 H. 4. 36. B.

(*e*) Br. Chemin, pl. 14, citing 5 H. 7. 7.

(*f*) 5 H. 7. 7.

by grant, by reservation, by custom, and from necessity : (1) to these may be added the claims to private ways given by Act of Parliament.

1. *By Prescription.*

Where a man is seised in fee, he may prescribe that "he and all those whose estate he hath in the said messuage, have from time immemorial had a foot-way, &c.," (*as the case may be*), and this is called prescribing in a *que estate*; (h) (2) so, a man may prescribe for a way to a church, market, &c., through the close of another; (i) or, the inhabitants of a vill may prescribe for a way to a parish church over a particular field; (k) or, as it seems, a way over a church-yard; (l) so, for inhabitants to have a crossway, for it is an easement and not an interest. (m)

A lessee for life or years, or tenant at will, or an inhabitant of a parish who is tenant at will, cannot prescribe to have a common in their own names, because of the meanness of their estates, but they may prescribe to have a way to church over another man's ground, because such are only easements; (n) but if a lessee prescribe for a way, he ought to make a good title to himself from his lessor. (o) But it is not necessary that the party [*324] prescribing for the right of way should occupy the premises in respect of which he makes the claim, provided he is proved to be seised thereof. (p)

364. A man cannot prescribe to have a way over another's ground from one part to another; (q) but from one part of his own ground to another he may claim a way over the ground of another person. (r) It has however been said, that if a man have right of way to the church, and the close next to the house over which the way leads is his own, he cannot prescribe that he has a right of way from his house to the church, because he cannot prescribe for a right of way over his own land, *sed quære*; (s) so, a claim of a prescriptive right of way from A. over the defendant's close unto D., is not supported by proof that a close called C., over which the way once led, and which adjoins to D., was formerly possessed by the owner of close A., and by him was conveyed in fee to another without reserving the right, for thereby it appears that the prescriptive right of way does not, as claimed, extend to D., but stops short at C. (t)

355. In claiming a way by prescription, the *termini* of the way should

(h) 1 Inst. 113, b. (i) Br. Chem. 2. (k) Jordan v. Atwood, 1 Roll. Abr. 936.

(l) Brook. Prescr. pl. 91, citing 18 E. 4, 8, pl. 10. (m) Stone v. Wakeman, Noy, 120.

(n) Dy. 72, cited 6 Mod. 366.

(o) 2 Lutw. 1528.

(p) Stott v. Stott, 16 East, 343; see also Proud v. Hollis, 1 B. & C. 8; S. C., 2 D. & R. 31.

(q) 6 Mod. 3.

(r) Id. 4; Carth. 451.

(s) Slowman v. West, Palm. 387; S. C., 2 Roll. Rep. 397; see also Wright v. Ratray, 1 East, 377.

(t) Wright v. Ratray, sup.

(1) Lawton v. Rivers, 2 McCord, 447. Wright v. Freeman, 5 Har. & Johns. 474.

(2) To render a prescription good, it must appear, 1, there was uninterrupted user; 2, the identity of the thing; 3, that it was adverse. Lawton v. McCord, ante, n. 1; and see post, § 380, n.

be set out, and the way should be shown to pass from such a place to such a place, *(u)* (1) for a man may not go over the grounds of another, but to the right place; *(v)* therefore, if a man claims a way from B. to the rectory, it is not good, for the *terminus ad quem* is uncertain; *(x)* or that it goes from B. to a close adjoining to a messuage in B., without saying in what parish the close was, for though the messuage was in B., perhaps the close adjoining was not; *(y)* *but a man who prescribes for a way through the close of B. need not say how many acres it contains; *(z)* so, it is not necessary to describe all the closes intervening between the two *termini*. *(a)* [*325]

2. By Grant.

366. A right of way is required by grant, when the owner of a piece of land grants to another the liberty to pass over his grounds to go to church or to market, and the like; *(b)* (2) so, if A. covenants that B. shall enjoy such a way. *(c)* (3) Unless a way be appendant to land, a grant of that land will not include the way without express words; *(d)* so, it will not pass under the term tenement; *(d)* but if it be appurtenant, it will of course pass under the word "appurtenances;" therefore, if a man seised of two acres, to which a way is appurtenant, grants one acre with all ways, &c., the way shall be granted; *(e)* but not if the way be extinct, *(g)* (4) unless the parties appear to have intended to use the words "appurtenances," or "all ways appertaining," &c., in a sense larger than their ordinary legal sense; *(h)* or unless it be a way of necessity which will pass without words of grant; *(i)* or that there had been a long period of previous enjoyment of the way. *(j)* So, by the words "all ways thereunto appertaining," in an underlease, a way over the soil of the original lessor will not pass, because the original owner only has the right of demising all ways appertaining to his property; *(k)* but it

(u) 39 H. 6, 6.

(v) Hob. 190; see also *Coble v. Allen*, Hutt. 10.

(y) 2 Lutw. 1528.

(a) *Simpson v. Lewthwaite*, 2 B. & Ad. 226.^a

(b) *Holme v. Seller*, 3 Lev. 305; 1 Ld. Raym. 75; Bull. N. P. 74; *Senhouse v. Christian*, 1 T. R. 560.

(c) *Holme v. Seller*, sup.

(x) Anon., 2 Leon. 10.

(z) Bro. Chem. 6.

(d) 11 H. 6, 22, B.

(e) *Staple v. Haydon*, 6 Mod. 3. See also Plowd. 170.

(g) *Sandeys v. Oliff*, Moor. 467; *Grimes v. Peacock*, 1 Bulst. 17; see also *Whalley v. Thompson*, 1 B. & P. 371; *Clements v. Lambert*, 1 Taunt. 205.

(h) *Barlow v. Rhodes*, 1 Cr. & M. 439.

(i) *Grimes v. Peacock*, sup.

(j) *Hinchcliffe v. Kinnoul*, (Earl), 5 Bing. N. C. 1; S. C., 6 Scott, 650.

(k) *Harding v. Wilson*, 2 B. & C. 100; S. C., 3 D. & R. 287.

(1) Hence a prescription of a right of way across plaintiff's land, where most convenient to defendant, and least injurious to plaintiff, is bad for uncertainty. *Jones v. Percival*, 5 Pick. 485.

(2) It ceases with the estate with which it is conveyed; as if dower be assigned with a right of way, it exists only so long as the estate of the dowress. *Hoffman v. Savage*, 15 Mass. 130.

(3) Or if land be conveyed bounded by a way, this is an implied covenant that such a way shall exist. This rule is confined to such ways as are actually in existence at the time of the conveyance, if any such there were, for the parties are presumed to have had reference to the facts. *Parker v. Smith*, 17 Mass. 416.

(4) Nor if the way had been used by a tenant for years, under an express provision in the lease. *Gayetty v. Bethune*, 14 Mass. 54.

^aEng. Com. Law Reps. xxiii. 59.

^bId. xxxv. 9.

^cId. ix. 39.

[*326] might in that case have *passed by the words "heretofore used;"^(l)(1) so, if by such an underlease a way be granted without specifying any breadth, although specified in the original lease, the under-lessee shall have a convenient way only;^(l) so, where there was a covenant in a demise for contributing with other occupiers of the lessor's property to the keeping up paths, &c., used in common by them, and it was proved that the plaintiff had always used the path in question, and that there was no other path to which the covenant could apply, it was held, that it might be inferred, particularly from the use of the word "common," that the defendant took the soil demised to him subject to the plaintiff's right of way.^(m)

Where, on the words of a grant in a lease, it is uncertain which of two ways is intended, parol evidence will be admitted to show which the grantor intended to grant;⁽ⁿ⁾ but not evidence of the acts and declarations of the parties, as showing where the way was intended to be;⁽ⁿ⁾ as to the presumption of a grant from user, see post, § 380.

But there is a distinction between a grant of land where a way is appendant, and a grant of a way in gross, for in the first case a way would pass in a parol lease for less than three years,^(o) because whatever is incident to land will pass under the name of land;^(o) but in the second case it goes with the person, and can take effect by deed only.^(p)(2)

367. A grant is always construed most strongly against the grantor; therefore, if a man grant premises with all ways, such ways as are ordinarily used shall pass; as if one seized of B. and W. use a way through W. to B., and then grant B. with all ways, the way through W. shall pass;^(q)(3) and this will be deemed to extend to every part of the demised premises, although no express mention be made of them in the lease; therefore, where [*327] by a lease certain houses, *with a piece of ground which was part of an adjoining yard, were demised to a tenant, and all ways with the said premises, or any part thereof used or enjoyed, the lessee was held entitled to a right of way to every part of the yard, such yard having been, at the time of granting the lease, in the occupation of one person, who had always used and enjoyed the same right;^(r) so, if a man seised of Blackacre and Whiteacre, uses a way through Whiteacre to Blackacre, and afterwards grants Blackacre with all ways, this way through Whiteacre shall pass to the grantee.^(s)(4)

(l) *Harding v. Wilson*, 2 B. & C. 100; ^a S. C., 3 D. & R. 287.

(m) *Oakley v. Adamson*, 8 Bing. 356; ^b S. C., 1 M. & Sc. 510.

(n) *Osborn v. Wise*, 7 C. & P. 761.^c

(o) 2 Roll. Abr. 60.

(p) *Slowman v. West*, Palm. 387.

(q) *Harding v. Wilson*, sup.

(r) *Koostra v. Lucas*, 5 B. & A. 830; ^d see also *Oakley v. Adamson*, 8 Bing. 356; *James v. Plant*, 4 Ad. & Ell. 761.^f

(s) *Staple v. Haydon*, 6 Mod. 3; Com. Dig. tit. Chemin, (D. 3.)

(1) *Gayetty v. Bethune*, 14 Mass. 54.

(2) And must be recorded as a deed of land. *Hays v. Richardson*, 1 Gill & Johns. 366.

(3) But where the owner of three closes, A., B., and C., had used a way through B. from A. to C., and then granted A. and C. with their appurtenances, the right of way was held not to pass, for it could not be an easement in his own land. *Barker v. Clark*, 4 N. H. 382.

(4) The grant will always be construed by the deed, even though forty years' user has

^aEng. Com. Law Reps. ix. 39. ^bId. xxi. 316. ^cId. xxxii. 723. ^dId. vii. 274.

^eId. xxi. 316.

^fId. xxxi. 170.

368. A mistake of the grantor in calling ways appurtenant, which, in fact, may be only convenient and accustomed ways, will not vitiate the grant, particularly where no proof was given of any other way *in alieno solo*, that would satisfy the words of the grant;(t) and where the word "appertaining" cannot have its proper signification it shall have such signification as was intended by the parties.(u)

So, a grantor will not be permitted to defeat his own grant; therefore, where the lessees of a colliery had agreed to grant to the lessees of a neighbouring colliery a license to use a right of way which the former enjoyed, and the owner of the first colliery then (improvidently perhaps) granted the same identical right of way, for a term of years, to the second lessee; subsequently, however, this owner became possessed by assignment of the first colliery, and of the way-leave, when he wanted to remove the materials from the old wagon road, but on an application to Chancery by the second lessees, he was prevented from so doing in contravention of his own deed;(v) but in cases of *this kind, the Court will sometimes grant a *quantum damnificavit*;(w) so, where one granted land of unequal width, [*328] described as abutting on a road on his own soil. It abutted on the broadest part of the road; but, in the narrowest part of it, a narrow strip of the grantor's land intervened between the road and the premises granted; it was held, that the grantor, and those claiming from him were concluded from preventing the grantee from coming out into the road over this slip of land; the grantor having said, "This land abuts on the road," it was not competent to him to say, that the land on which it abutted was not the road;(x) so, one who has a grant of an occupation way may declare in case against the owner of the land over which the way leads, for obstructing him, although it be proved that the public in general had used the way without denial for the last twelve years.(y)

369. Under the grant of a free and convenient way for the purpose of carrying coals, (among other articles,) the grantee has a right to lay a framed wagon-way, or any such way as may be necessary for the carrying of that commodity;(z) so, where A. granted to B., his heirs and assigns, occupiers of certain houses abutting on a piece of land about eleven feet wide, which divided these houses from a house then belonging to A., the right of using the said piece of land as a foot or carriage way, and gave him "all other liberties, powers, and authorities, incident or appurtenant, need-

(t) *Morris v. Edgington*, 3 Taunt. 31.

(v) *Newmarsh v. Brandling*, 3 Swanst. 99.

(x) *Roberts v. Karr*, 1 Taunt. 495.

(z) *Senhouse v. Christian*, 1 T. R. 560.

(u) *Plowd.* 170.

(w) — *v. White*, cited 3 Swanst. 108.

(y) *Allen v. Ormond*, 8 East, 4.

been more extensive, if the right to narrow the use had not been previously exercised; as where the privilege to erect back buildings was reserved but not used for forty years, during which time the whole space in rear of the house was used as a way. *Atkins v. Boardman*, 20 Pick. 301. The intention of the party is to govern; thus where A., the owner of a tract near the river and an island opposite used for grazing, agreed with B., the owner of the bank of the river, for a way to be laid out for both of them to low water mark in the direction of the island, and through A.'s land to the great road; it was held, that by a conveyance of the island with its appurtenances, this right of way passed; and that B. had consented to the way being appurtenant to both the island and the tract on the main land held by A. *Lazaretto Road*, 1 Ashmead, 417.

ful or necessary to the use, occupation, or enjoyment of the said road, way, or passage," held, that under these words B. had a right to put down a flagstone in this piece of land, in front of a door opened by him out of his house into this piece of land, as the same was granted for the occupation of [*329] a dwelling-house, and the grantee ought to have *every thing need-ful for such occupation.(a) Leases generally contain the words "heretofore used," by which such ways would pass as have been heretofore enjoyed; but in the absence of these words or words to the like effect, an underlease would confer nothing more than a convenient way.(b)

370. On the other hand, under the grant of a way from A. to B. in, through, and along a particular way, the grantee is not justified in making a transverse road across the same;(c)(1) so, if a person has a way through a close in a particular direction, and he afterwards purchases other closes adjoining, he cannot extend the way to those closes;(d)(2) so, a person having a private way over the land of another, cannot when the way is become impassable by the overflowing of the river, justify going on the adjoining land, although such land, together with the land over which the way is, both belong to the grantor of the way;(e) it is otherwise where a highway is impassable; but that is upon a different principle, for in that case, if the usual track is impassable, it is for the general good that people should be entitled to pass in another line,(e) see also further as to the user of a way, post, §§ 376, 377.

3. By Reservation.

371. A right of way may be claimed by express reservation, as where A. grants land to another reserving to himself a way over such land; and the construction of such reservations will be the same as in the case of grants, for what will pass by words in a grant will be excepted by like words in an exception;(g) therefore, where a grantor conveyed in fee farm land in the manor of A., "excepting and reserved out of the grant all mines [*330] of coals within the fields and *territories of A. aforesaid, together with sufficient wayleave and stayleave to and from the said mines, with liberty of sinking and digging pits," held that under this reservation of "a sufficient wayleave" the right of erecting a steam-engine, and other machinery necessary for draining them, with all proper accessaries, passed as incident thereto;(h) and the right was not confined to such ways as were in use at the time of the grant,(h) *sed quære* whether such a reservation

(a) *Gerrard v. Cook*, 2 N. R. 169.

(b) *Harding v. Wilson*, 2 B. & C. 100.s

(d) 1 Roll. Abr. 391; 1 Mod. 190.

(g) *Sheph. Touchst.* 100.

(c) *Senhouse v. Christian*, 1 T. R. 560.

(e) *Taylor v. Whitehead*, Dougl. 744.

(h) *Dand v. Kingscote*, 6 M. & W. 174.

(1) And if the right of way be indefinite in the grant, the grantee has the right to elect the location; and when that is made, any deviation would be a trespass. *Jones v. Percival*, 5 Pick. 487.

(2) *Kirkham v. Sharp*, 1 Whart. 323.

Eng. Com. Law Reps. ix. 39.

gave the liberty to construct a railway to the exclusion of the owner of the soil.(h)(1)

4. *By Custom.*

372. A right of way may likewise be claimed by custom, and a custom that every inhabitant of a certain vill shall have a way over certain land to church or to market is good, because it is an easement only, not a profit;(i) so, a tithe-owner is entitled to make use of the road ordinarily used in the occupation of the close in which the tithe is taken;(k) but, he cannot justify carrying his tithes home by any other road, although the farmer himself may have used it for the occupation of his farm;(k) so, the right to use a towing-path along the banks of navigable rivers is founded upon, and must be ascertained solely by, the usage.(l)

5. *By Necessity.*

373. Lastly a right of way may be claimed from the necessity of the thing. It is a settled rule of law that the grant of a thing shall carry all things included, without which the thing granted cannot be had or enjoyed;(m)(2) *therefore, if a person having a close, bounded on every side by his own land, grants the close to another, the grantee [*331] shall have a way as a necessary incident to the grant, as otherwise he can derive no benefit from the grant;(n) and it is the same, though the close aliened be not totally inclosed by the grantor's land but partly by a stranger's, for the grantee may not go over the stranger's land;(o) so, in the case of a

(h) *Dand v. Kingscote*, 6 M. & W. 174. (i) *Stone v. Wakeman*, Noy. 120.

(k) 1 Bulstr. 108, recognized in *Cobb v. Selby*, 2 N. R. 466.

(l) *Vernon v. Prior*, recognized in *Ball v. Herbert*, 3 T. R. 253, overruling the decision as to this point, *R. v. Cluworth*, (Inhab.) 6 Mod. 163; see also *Pierce v. Ld. Fauconberg*, 1 Burr. 292, recognized in *Ball v. Herbert*, sup.; *Miles v. Rose*, 1 Marsh. 313.

(m) *Hob. 234.*

(n) *Oldfield's case*, Noy, 123; 2 Roll. Abr. 60, pl. 17.

(o) 2 Roll. Abr. 60.

(1) In case the way be not impaired for the uses for which it was given, the grantee has the right to erect an arch over the passage. *Atkins v. Boardman*, 20 Pick. 298. *Jackson v. Allen*, 3 Cow. 229.

(2) This way of necessity will exist in case of a levy and sale of part of the land fronting the street. *Pernan v. Wead*, 2 Mass. 203, but it must be strictly of necessity; hence if any street may be reached through the land of the owner, a way is not given through the part taken. *McDonald v. Lindall*, 3 Raw. 495. Even though the way which is left requires great expense to render it suitable, (unless there be fraud.) *Allen v. Kincaid*, 2 Fairfield, 156. Or if a communication by water be the only one, it does not follow a way of necessity exists by land. *Lawton v. Rivers*, 2 M'Cord, 448. *Turnbull v. Rivers*, 3 M'C. 139; if the right exists it must be exercised, to cause the least possible injury, and may be continued within reasonable bounds by the owner of the land. *Russell v. Jackson*, 2 Pick. 577. It seems such a right can only exist against a party who has granted it by implication, and that a purchaser of land surrounded by that of strangers would not thereby obtain such a right, *Gayetty v. Bethune*, 14 Mass. 56. The burden is thrown on him who creates it—thus where an execution had taken part of the land, and a subsequent execution another part, thereby excluding the residue from all communication with the street, it was held the right of way existed only over that part last taken, and the fact that a much more convenient way existed over the former was immaterial. *Russell v. Jackson*, 2 Pick. 576. *Jetter v. Mann*, 2 Hill, S. C., Rep. 641.

*Eng. Com. Law Reps. i. 240.

reservation, for where a man having four closes lying together, sells three of them, reserving the middle close, but not mentioning expressly anything as to a way for himself, here the law will reserve a way for his benefit ;(*p*) and this rule is not affected by unity of possession ;(*q*) and the rule applies as well to a trustee as to any other grantor.

Thus, where a person, as a trustee, conveyed land to another, to which there was no access except over the ground of the trustee, it was held, that, as it could not be intended that the trustee made a void grant, it must be supposed that some beneficial interest must be conferred, and hence arose a way of necessity ;(*r*) so, in the case of a lease, if land be granted with a way thereto, the way shall be *quasi* appendant to it, and shall pass as a matter of necessity, although not expressed in the lease, for the land cannot be used without it.(*s*)

374. On a similar principle a rector may enter into a close to carry away the tithes by the usual road ; for the privilege is incident to the right of tithes given to him by the law ;(*t*) so, if one have, either by grant or prescription, a right to wreck thrown upon another's land, he has of necessary consequence a right to a way over the same land to take it ;(*x*) and as the [*332] queen has a right of way over *another's land, her grantee shall have the same ; but this kind of way cannot be pleaded generally, without shewing the manner in which the land over which the way is claimed is charged with it ; for a plea that supposes, that, wherever a man has not another way, he has a right to go over his neighbour's close, is bad, because he has no such general right ;(*y*) and a way of necessity is only commensurate with the existence of such necessity ; and when the necessity ceases, the right of way also ceases ; therefore, where a man has a way of necessity over certain lands, such way ceases to exist, on his being able to approach and occupy the land for which such way was used, by passing over his own soil ;(*z*)(1) and where a way is claimed of necessity, it will be a good plea that the plaintiff has another way ;(*a*) but it is otherwise, when a way is claimed by prescription or grant.

375. Where there is an ancient way, it should be first claimed ; therefore, where A. the owner of a close situate within a close belonging to B., had a prescriptive right of way through B.'s close to his own, and B. stopped up the old way and made a new one, which was afterwards used, but subsequently was also stopped up by B., in an action by B. against A. for going over the new way, it was held that A. could not justify using this

(*p*) Clarke v. Cogge, Cro. Jac. 170 ; S. C., Ow. 122.

(*q*) Dutton v. Taylor, 2 Lutw. 1487 ; Packer v. Walsted, 2 Sid. 39 ; also *infra*, § 384.

(*r*) Howton v. Frearson, 8 T. R. 50. (*s*) Beaudely v. Brook, Cro. Jac. 189.

(*t*) Cobb v. Selby, 2 B. & P. 466. (*x*) Anon., 6 Mod. 149.

(*y*) Bullard v. Harrison, 4 M. & S. 387 ; see also 1 Wm. Saund. 323, n. (6.)

(*z*) Holmes v. Goring, 2 Bing. 76 ;^b S. C., 9 Moore, 166.

(*a*) Clarke v. Cogge, Cro. Jac. 170 ; Staple v. Heydon, 6 Mod. 4 ; Com. Dig. tit. Chemin, (D. 4.)

(1) McDonald v. Lindal, 3 Raw. 495. Taylor v. Hampton, 4 M'Cord, 108.

^bEng. Com. Law Reps. ix. 324.

way as a way of necessity, but that he should either have gone the old way and thrown down the inclosure,(1) or brought an action against B. for stopping up the old way ;(b) the new way was only a way of sufferance during the pleasure of both parties, and A. by stopping it up determined his pleasure ; so, if the owner of a close in which there is an ancient way, ploughs it up, leaving a new way in another part, a person may justify going along the ancient way, for he is not *bound to go the way [333] which is unploughed ;(c) yet if a person choose to go along the new way he may justify the trespass, because the plaintiff had stopped up the old way.(d)

But if a man possessed of a close surrounded by others, grant that close, the grantee shall have a convenient way ; he is not bound to use the same way as the feoffor has done ;(e) for here the old way is extinguished and a new one granted from the necessity of the case, and, consequently, it ought to be such an one as will afford the most convenient and reasonable mode of enjoying the premises ;(g) and so the way should be over the most convenient part of the grantor's land as a necessary incident,(h) see further infra, § 376.

III. User of Ways.

§ 376. Prescriptive Ways.

Extent of the Right.

377. Subject to Terms of the Grant.

License.

378. Convenience of Grantee.

§ 379. Ways of Necessity.

380. Presumption of a Grant from long User.

381. User under the Prescription Act.

§ 376. As to prescriptive ways, a person is justified in using the ancient way, although it be ploughed up and a new way left ;(i) but a right of way for agricultural purposes is a limited and qualified right, and does not necessarily confer a right to use such way for general and commercial purposes ;(k) so, a right of way for all manner of carriages does not necessarily include a right of way for all manner of cattle ;(l)(2) so, where a man has a right of way for carriages and *cattle to a particular close, he cannot extend the right to other closes ;(m) therefore, where A. [*334] had a way over B.'s ground to Blackacre, and drove his beasts over B.'s ground to Blackacre, and then to another place lying beyond Blackacre, it

(b) Reynolds v. Clerk, Willes, 282.

(c) Horn v. Taylor, Noy, 128.

(d) Horn v. Widlake, Yelv. 141 ; S. C., 1 Brownl. 212.

(e) Oldfield's case, Noy, 123.

(g) Edgington v. Morris, 3 Taunt. 31.

(h) Staple v. Heydon, 6 Mod. 3.

(i) Oldfield's case, Noy, 123.

(k) Jackson v. Stacey, Holt, N. P. Ca. 455.

(l) Ballard v. Dyson, 1 Taunt. 279.

(m) 39 H. 6. 6, cited in Bro. Chem. pl. 6 ; 1 Roll. Abr. 391, pl. 3.

(1) Wynkoop v. Burger, 12 Johns. 222.

(2) Where the full and free right of way was granted to the owner of the adjoining house, it was held, the grantor could not extend it to other houses afterwards purchased, which at the time of the grant did not participate in the enjoyment. Kirkham v. Sharp, 1 Whart. 323.

was held that he could not justify using the way to those lands, which he occupied beyond ;(n) for a man might purchase a hundred or a thousand acres adjoining to Blackacre, to which he prescribes to have a way, by which the owner of land would lose the benefit thereof ;(n) for a prescription presupposes a grant, and ought to be continued according to the intent of its original creation ;(n) so, if a man have a right of way to a close for some purposes, he must not enlarge it to other purposes ;(o) but the extent of the right is a question for the jury under all the circumstances.(p) For this reason in claiming a way by prescription the *termini* of the way should be set out ;(q) also where the way is impassable.(r)

377. In the case of grants the user of way is regulated by the terms of the grants, subject to the construction of the Courts, which, as in other cases of grants, is most strict against the grantor.(s) On the other hand, the grantee is bound to keep within the terms of his grant,(1) therefore if one seised in fee of a place in a town, shut out from the street by a gate, and also seised of a messuage and piece of land adjoining, enfeoffed another of the messuage and piece of land, and granted him "ingress, egress, and regress in, to, and beyond the same premises and the aforesaid gate and place," it was held, that, under this grant, the grantee may go from the street through the gate, and over the place to the messuage, &c., but not [*335] through the said gate or place to "other places, or from other places to the street without coming to the messuage &c., for the license was made appurtenant to the premises granted.(t)(2)

So, a reservation in a lease of a right of way on foot, for horses and cattle, does not give a right to carry manure ;(x) and it has been held, that where there is any material alteration in the substance of the thing, in respect of which the right is claimed, so as to be to the prejudice of the person supplying the easement, it will give no additional right, therefore, where B. the owner of the *locus in quo*, and also of certain other land with houses and a stable, loft and chaise-house, conveyed to A. a part of the premises, reserving to himself, his heirs, &c., occupiers for the time being of a messuage, (not conveyed,) a right of way and passage over the *locus in quo* to the stable and loft over the same, and the space or opening under the loft, and then used as a wood-house, and to the chaise-house standing on the side of the *locus in quo*, (the stable, loft, wood-house, and chaise-house not being conveyed,) and also the use of the *locus in quo* in common with A., his heirs, &c., and their tenants for the time being, and it was expressed to be

(n) *Howell v. King*, 1 Mod. 190.

(o) *Webster v. Bach*, 1 Freem. 247 ; *Saunders v. Mose*, 1 Roll. Abr. 391, pl. 2 ; *Laughton v. Ward*, 1 Lutw. 111 ; S. C., nom. *Lawton v. Ward*, 1 Ld. Raym. 75.

(p) *Cowling v. Higginson*, 4 M. & W. 245.

(q) See ante § 365.

(r) See ante, § 170.

(s) See ante, § 367.

(t) *Hodder v. Holman*, 1 Roll. Abr. 391, pl. 1.

(x) *Brunton v. Hall*, 1 G. & D. 207.

(1) Thus on a grant of a lot with a right of way across another lot, the grantee cannot justify passing partly across the lot, and then returning to another point on the same side. *Comstock v. Van Deusen*, 5 Pick. 163. Even though the way become impassable. *Miller v. Bristol*, 15 Pick. 553.

(2) *Kirham v. Sharpe*, 1 Whart. 333. *Lazaretto Road*, 1 Ash. 423.

the intent of the parties that the whole of the yard comprehending the *locus in quo* should be open and undivided, as the same then was, and be used in common by the occupiers of both messuages as the tenants thereof had been accustomed theretofore to use them; afterwards B. built a cottage on the site of the opening under the loft, and it was held that the reservation of the use of the *locus in quo* did not authorize B. to use it for the purpose of passing to the newly erected cottage.(y)

So, where there is a license to use a certain way, there must be a reasonable use of it; therefore, where one let a house reserving a way to a back side, it was held that the *grantor might not come through [*336] without request, and that too at seasonable hours.(z)

378. But the grantee may do anything within the terms of his license, that will most contribute to his convenience, and best serve the purposes intended, as if it be a grant of a way for the carriage of coals, &c., the grantee may make a framed wagon-way;(a) so, if he have a right of way for carriages and cattle, his servant may justify going with the cattle of his master.(b)

So, as a right to repair is incident to the grant of a way, the grantee may exercise his right by repairing in the way most convenient to himself, provided he does not thereby do any thing to the prejudice of the grantor,(c) see ante, § 169; but if a man grants a way through his close to another, he is not bound to keep it in repair, unless he be bound by express stipulation or by prescription;(d) consequently, if the way be foundrous, the grantee is not justified in going over the adjoining ground,(1) and what is said in Comyn's Digest and Blackstone's Commentaries on the authority of Sir W. Jones, 296, 1 *Ld. Raym.* 725, 1 *Brownlow*, 212, and 2 *Shower*, 28, must be understood of public, not of private ways,(e) see also ante, § 170.

379. As to ways of necessity, a parson in carrying away his tithes may use the ordinary occupation way, but he cannot justify using any other road, though used by the farmer himself.(f) While a tenement is occupied by a tenant, the landlord may use his way to view waste, or demand rent, or to remove an obstruction;(g) so, where trees are excepted *in a lease, [*337] the lessor has a power, by law incident to the exception, to fell and take away the trees, although this power is usually reserved to him in express terms.(h)

380. Grants of a right of way were, before the Prescription Act, 2 & 3

(y) *Allan v. Gomme*, 11 *Ad. & Ell.* 759;¹ *S. C.*, 3 *P. & D.* 531.

(z) *Tomlin v. Fuller*, 1 *Vent.* 48.

(a) *Senhouse v. Christian*, 1 *T. R.* 560; see ante, § 169.

(b) *Lawton v. Ward*, *sup.*

(c) *Gerrard v. Cook*, 2 *N. R.* 109.

(d) *Rider v. Smith*, 3 *T. R.* 799.

(e) 1 *Wins. Saund.* 322 a, n. (3).

(f) *Cobb v. Selby*, 2 *N. R.* 466; *Bosworth v. Limbriek*, 3 *Gwill* 1109.

(g) *Proud v. Hollis*, 1 *B. & C.* 8; *S. C.*,^e *nom. Hollis v. Proud*, 2 *D. & R.* 31; see also *Bartie v. Beaumont*, 16 *East*, 33; *Stott v. Stott*, *Id.* 343.

(h) *Liford's case*, 11 *Co.* 48.

(1) *Miller v. Bristol*, 12 *Pick.* 552.

¹*Eng. Com. Law Reps.* xxxix. 213. ²*Id.* viii. 7.

W 4, c. 71, (see Dig P. iii. tit. Prescription,) presumed from long enjoyment, and the Courts were in the practice of leaving it to a jury in such cases to presume a grant, where its commencement could not be otherwise accounted for.⁽ⁱ⁾ Therefore, in *Keymer v. Summer*^(k) thirty years' user of a way was held to afford a presumption of a grant or license; in another case a user for twenty years exercised adversely was held to afford sufficient grounds for the jury to presume a grant;^(l) (1) as where an occupation way had been assigned under the award of commissioners of inclosure to one Joseph W. by mistake for one John W., a user exercised adversely under this mistake was sufficient to leave it to a jury to presume a grant, which must have been made within twenty-six years, as all former ways were at time extinguished by the operation of an inclosure act;^(l) so, where a defendant pleaded that his deed of grant had been lost, the jury were directed, that if they thought the defendant had exercised the right of way uninterruptedly for more than twenty years by virtue of a deed, and that that deed had been lost, they should find for the defendant; and that direction was held to be right.^(m)

But the presumption of a non-existing grant might be rebutted by evidence showing that the way had been used by leave or favour;⁽ⁿ⁾ (2) so, in order to presume a grant against any party, it was necessary to show that the exercise of the adverse right on which such presumption was founded, was against the party capable of making the grant, and that it could not be [*338] presumed against him, unless there were some probable means of his knowing what was done against him; the landlord therefore was held not bound by the acquiescence of the tenant without his knowledge, though for twenty years,^(o) and whether he knew or not of the adverse enjoyment was a question for the jury;^(p) so, the knowledge of the owner

(i) *Doe v. Reed*, 5 B. & A. 232.[†]

(k) *Bull. N. P.* 75.

(l) *Campbell v. Wilson*, 3 East, 294.

(m) *Livett v. Wilson*, 3 Bing. 115; S. C., 10 Moore, 439.

(n) *Campbell v. Wilson*, sup.

(o) *Daniel v. North*, 11 East, 372.

(p) *Dawson v. Norfolk (Duke)*, 1 Price, 247; *Gray v. Bond*, 2 B. & B. 667; S. C., 5 Moore, 527.

(1) Twenty years' user is sufficient to presume a grant of a right of way, but to make it, the user must have been adverse, *Maverick v. Austin*, 1 Bailey, 58; not by permission, express or implied, as through a forest, *Gayetty v. Bethune*, 14 Mass. 53. It was however held in *Worrall v. Rhoads*, 2 Whart. 427, that the fact of the land being uninclosed and woodland, and that ways used indiscriminately through every part, did not effect the presumption of a grant. It must be an uninterrupted user of the same way not variable at the pleasure of the owner of the soil, *Lawton v. Rivers*, 2 McC. 450; *Turnbull v. Rivers*, 3 McC. 138; nor is an occasional landing by the public, *State v. Duncan*, 2 McC. 130; *Odiorne v. Wade*, 5 Pick. 421. Sufficient plowing the soil and declarations by the owner, at the time, in the absence of the party claiming the right, are evidence contradictory of such right, *Barker v. Clark*, 4 N. H. 384. The erection of a gate at the time a way is opened, is sufficient to rebut the presumption of the grant of a common way, *Commonwealth v. Newberry*, 2 Pick. 57. The extent of the right is confined by the mode of user, *Hart v. Chalker*, 5 Conn. 316, unless the grant be shown, in which case it will be confined by the terms of the instrument, not having been adverse thereto. *Atkins v. Bordman*, 20 Pick. 291. This presumption may be made from evidence of contribution to repairs of the way, *Lewis v. Carstairs*, 6 Whart. 208; and such right, when acquired, cannot be destroyed by evidence of interruption after the twenty years have elapsed, *Cuthbert v. Lawton*, 3 McCord, 195; *White v. Crawford*, 10 Mass. 189.

(2) See preceding note.

[†]Eng. Com. Law Reps. vii. 79. 11d. xi. 57.

might be presumed if the user had been for a great length of time, *(q)* or from other circumstances, as where the lessees of a fishery had publicly landed their nets on the shore for more than twenty years, and had at various times dressed and improved the landing-place, and both the fishery and landing-place originally belonged to one person; it was left properly to the jury to presume a grant of the right of landing. *(r)*

381. The enjoyment of an easement as of right for twenty years next before the commencement of the suit, within the 2 & 3 W. 4, c. 71, means a continuous enjoyment, for twenty years next before the commencement of the suit, of the easement as an easement; *(s)* therefore, a plea of forty or twenty years is not supported by proof of a user for a period of fifty years before the commencement of the action, with the exception of four years immediately preceding it; *(t)* but if there be ten years' enjoyment of a right of way, and then a cessation under a temporary agreement for another ten years, this may still be a sufficient enjoyment of the old right for twenty years to make it indefeasible under the statute, for the agreement to suspend the enjoyment of the right does not extinguish the same, nor is it inconsistent therewith. *(u)*

Again, in order to establish a right of way within the statute it must be proved that the claimant has enjoyed "as of right" *for the full [*339] period of twenty years; the way must have been enjoyed openly, not by stealth; *(x)* so, if only enjoyed by permission of the occupier of the land, no title would be acquired, because it was not enjoyed "as of right;" *(x)* so, for the same reason, the claim would be defeated if unity of possession were proved during any part of the twenty years, for then the claimant would not have enjoyed "as of right" the easement, but the soil itself; *(y)* and so, likewise, it must have been enjoyed without interruption, *(z)* see further *infra*, § 394.

So a claim under this act may be defeated in the same manner as a similar claim, arising by custom, prescription, or grant, might have been defeated. *(a)* See further as to Prescription, *post*, TITLE TO THINGS REAL, and Dig. P. iii. tit. Prescription.

As to the effect of non-user, see *infra*, § 382.

IV. How lost, destroyed, or extinguished.

1. Loss by Non-user, &c.

§ 382. In what Cases.

383. By Change of the Place in case of Prescriptive Ways.

(q) *Davies v. Stephens*, 7 C. & P. 570.^h

(r) *Gray v. Bond*, *sup.*

(s) *Bright v. Walker*, 1 C., M. & R. 211; S. C., 4 Tyrw. 508.

(t) *Parker v. Mitchell*, 11 Ad. & Ell. 788; S. C., 3 P. & D. 655.

(u) *Payne v. Shedden*, 1 Mood. & Rob. 383.

(x) *Bright v. Walker*, *sup.*

(y) *Ib.*; and see also *Clay v. Thackrah* or *Thackeray*, 9 C. & P. 47; * S. C., 2 M. & Rob. 244.

(z) *Onley v. Gardener*, 4 M. & W. 497.

(a) *Bright v. Walker*, *sup.*

^hEng. Com. Law Reps. xxxii. 634. ⁱId. xxxix. 229. ^kId. xxxviii. 31.

2. *Extinguishment by Unity of Possession.*

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| 384. In case of Purchases, &c., of the Land. | 386. Unity of Possession under the Prescription Act. |
| 385. New creation of a Way. | 387. A private Right of Way not merged in the Public Right. |
| 386. Ways of Necessity not extinguished. | 388. Right not destroyed by alteration of Estate. |

3. *Extinguishment of Ways under Acts of Parliament.*

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| 389. Inclosure Acts. | 390. Highway and Turnpike Acts. |
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[*340]

*1. *Loss by Non-user, &c.*

§ 382. A right of way may be lost or destroyed either by non-user, or by a change of the thing in respect of which the right is claimed.

A right of way, like a right of common, is something collateral to the land, and therefore not regularly divested by non-user; but as from long user of a right of way a grant might be presumed,(b) so, from a long forbearance to exercise the right, a release might be presumed;(c)(1) and as the right could only be acquired by twenty years' enjoyment, so it ought not to be lost by disuse for a less period.(d)(2)

383. It has long been settled that circumstantial variations will not destroy a prescription;(3) therefore, a prescription to take water was not destroyed by changing a fulling-mill to a grist-mill, provided no prejudice thereby arose by diverting and stopping the water, and rendering it different from what it was before;(e) see also as to estovers, ante, § 299. So, a prescriptive right of way to a public towing-path on the banks of a navigable tide-river, is not destroyed by that part of the river adjoining the towing-path having been converted by statute into a floating harbour, although such towing-path was thereby subject to be used at all times of the tide, whereas before it was only used at those times when the tide was sufficiently high for the purpose of navigation;(g) and such prescription is not destroyed by a clause in the statute, whereby the undertakers of the work were authorized to make a towing-path over the land, comprising the towing-path in question, on paying a compensation to the owner of the soil.(g)

[*341] *384. Ways may be extinguished either by unity of possession, or under acts of Parliament.

(b) See ante § 180.

(c) Doe v. Hilder, 2 B. & A. 791.

(e) Luttrell's case, 4 Co. 86.

(d) Moore v. Rawson, 3 B. & C. 339.¹

(g) R. v. Tippet, 3 B. & A. 193.^m

(1) This gives presumption of a release, but is not a bar in law to an action. Wright v. Freeman, 5 H. & Johns. 476. It will even afford a presumption against the public. Beardslee v. French, 9 Conn. 128. But adverse possession inconsistent with the right is a bar. Yeakle v. Nace, 2 Whart. 131.

(2) Emerson v. Wiley, 10 Pick. 316.

(3) Lawton v. Rivets, 2 M'C. 450.

¹Eng. Com. Law Reps. x. 99. ^mId. v. 258.

2. *Extinguishment by unity of Possession.*

Unity of possession of the close where a private way exists, with the close to which such a way is appurtenant, or which gives the right of way, causes an extinction of the same, as if a man have a way over the close of another, and he purchase that close, the way is extinguished by the unity of possession. *(h)*

So, where one had a crossway by prescription to go to Whiteacre over Blackacre, and then he purchased Blackacre, and subsequently enfeoffed a stranger, adjudged that the way was gone; *(i)* for in such cases the greater benefit drowns the less, *(k)* which consequently ceases to exist; *(l)* on the same principle, where one had a close and a wood adjoining to it, and time out of mind a way had been used over the close to the wood; and he granted the close to one and the wood to another, held that the grantee of the wood should not have the way; and as the grantor had not reserved it to himself it was extinguished; *(m)* and where in the case of a partition of a mill and a way, the way was assigned to one, this was held not to be an extinguishment, but a new grant.

Although an existing way will pass under the word "appurtenances," yet, according to the legal sense of this word, an easement which has become extinct, or which does not exist in point of law, by reason of unity of possession, does not pass; *(n)* therefore, where a testator being seised in fee of the adjoining closes, A. and B., over the former of which a way had immemorially been used to the latter, devised B. *with the appurtenances, held, that the devisee could not, under the word "appurtenances," claim a right of way over A. to B., as no new right of way was created, and the old one was extinguished by the unity of seisin in the devisor; *(o)* see also *Clements v. Lambert*, *(p)* which is the case of a common, also *Barlow v. Rhodes*, *(q)* which relates to the word "appurtenances."

385. If the grantor wish to revive or create anew such a right, he must do it by express words, or introduce the terms "therewith used and enjoyed," in which case easements existing in point of fact, though not in point of law, would vest in the grantee; *(r)* but it has been held that a grant of Whiteacre and Blackacre, "with all ways used, occupied, or enjoyed therewith," extends to ways used, &c., over other lands of the grantor, but does not convey to the grantee a right to ways used to and from one of the parcels over the other of them; therefore, where A. and B., coparceners, convey to C. Whiteacre and Blackacre, together with all ways therewith

(h) 21 E. 3. 2; 21 Ass. pl. 1; 11 H. 4. 15; Dy. 295; Palm. 446; Latch. 154; 1 Roll. Abr. 935.

(i) Heigate v. Williams, Noy, 119.

(k) Shury v. Pigott, 3 Bulst. 340.

(l) Latch. 153.

(m) Dell v. Babthorpe, Cro. El. 300; Bro. Chemin, pl. 13, citing 3 H. 6. 31; but see contra, 20 E. 3. Admeasurement, 8.

(n) Grymes v. Peacock, 1 Bulst. 19; Saundey v. Oliff, Moor. 467.

(o) Whalley v. Thompson, 1 B. & P. 371.

(p) 1 Taunt. 205.

(q) 1 Cr. & M. 439; see also 3 Taunt. 30.

(r) Plant v. James, 4 Ad. & Ell. 761; 2 Nev. & Mann. 517.

usually held, used, occupied, and enjoyed as to Whiteacre and the appurtenances, to the use of A. and his heirs, and as to Blackacre and its appurtenances to the use of B. and his heirs, held, that the way used before the partition from Whiteacre over Blackacre does not vest in A. under this deed.^(r) But commissioners of partition may award a right of way over the lands of one party to the lands of another party interested in the partition.^(s)

386. A distinction however has been taken between ways of mere easement and ways of necessity, for in the latter case the right is not lost;⁽¹⁾ [*343] therefore, where one had a way *appendant to his house, and then he purchased the close where his right lay, after which he enfeoffed another of the close, but continued to use his way, held, in an action against him by the feoffee, that the feoffer, would lose the benefit of his house, unless he were permitted to have the use of this way;^(t) so, ways to the church or the market being ways of necessity will not be extinguished by unity;^(x) and so it was adjudged in another case, where by the plea it appeared that the way was necessary;^(y) so, where one W. purchased a close A., with a right of way to it over another close B., and then purchased the latter close, and subsequently a third close C., adjoining to that to which the way belonged, by which last purchase he was enabled to enter the first close, without availing himself of the way as it existed before the unity of possession; he then sold the close B., over which the right was originally used, to the plaintiff, and afterwards parted with the two others to the defendant, held, that the way would have been extinguished, if claimed as a way by prescription, but being a way of necessity it remained;^(z) but a way of necessity is limited by the necessity that created it, and when the necessity ceases, the right ceases.^(a)

Under the Prescription Act a claim of a way may be defeated by unity of possession within the twenty years, in the same manner as under the old law.^(b)

387. A person may have a right of way in a road after it is become a highway, and the private right will not become merged in the public right; therefore, where one had a grant of an occupation way, held, that he might have an action against the owner of the land over which the way, [*344] *led, for obstructing it, although it were proved that the public had used the way without denial for the last twelve years, the Court

(r) *Plant v. James*, 4 Ad. & Ell. 761; 2 S. C., 2 Nev. & Mann. 517.

(s) *Lister v. Lister*, 3 Y. & Coll. 540.

(t) *Jordan v. Attwood*, Ow. 121.

(x) *Surrey v. Piggott*, Noy, 84; S. C., Bulstr. 340; see also *Latch*. 154; *Poph.* 172; *Palm.* 446; *Cro. Jac.* 170.

(y) *Dutton v. Taylor*, 2 Lutw. 1489.

(z) *Buckley v. Coles*, 5 Taunt. 311.^p

(a) *Holmes v. Goring*, 2 Bing. 76; 1 S. C., 4 J. B. Moore, 166; see ante, § 374.

(b) See ante, § 381.

(1) *Grant v. Chase*, 17 Mass. 448. Unless the necessity ceases in any way. *McDonal v. Lindal*, 3 Rawls, 495.

oEng. Com. Law Reps. xxxi. 170. rId. i. 115. sId. ix. 324.

being of opinion that the plaintiff might rest his title under the deed, and need not resort to the general right.(c)

388. So, a way shall not be destroyed by a change of tenure; therefore, where a copyholder had a way, time out of mind, over the land of another copyholder, and purchased the inheritance of his copyhold, which operated as an enfranchisement of his estate, yet, nevertheless, the easement was not extinguished.(d) But a way of necessity will become extinguished, like any other way, when the necessity ceases.(e)

3. *Extinguishment of Ways under Acts of Parliament.*

389. Under the General Inclosure Act, 41 G. 3, c. 109, s. 11,(f) it is declared that all ways which shall not be set out by the commissioners shall be extinguished, and where a private Inclosure Act does not vary the terms of the General Act, and commissioners in their award do not notice a road running over inclosed lands, such way is extinguished by the operation of the General Act; therefore, where a plaintiff having an allotment made to him by a commissioner under an Inclosure Act, of land over which the defendant had a private right of way before the passing of the Act, but which way was not noticed among those set out by the commissioner, the plaintiff may justify stopping up such way without any directions from the commissioner for that purpose,(g) for the statute does not affirm another way to be set out in lieu of every old one;(h) but where commissioners had no power *under the General or Particular Act to stop up a way [*345] over old inclosures, and did not by their award set out any new way over the waste land inclosed, held, that an old footway passing from one highway, over wastes to old inclosures, into another, existed as it formerly did.(i)

But where by an Inclosure Act a way could not be extinguished without the concurrence of two justices, held, that a way was not extinguished for want of such express concurrence;(k) and this was deemed to extend to all roads public or private.(l) So, where under an Inclosure Act an appeal was given in all cases, except where the determination of the commissioner was declared conclusive by the General or Particular Inclosure Act, and a commissioner set out a private road, which, upon complaint, was disallowed by the commissioner and one justice, held, that appeal was not taken away, because the order was by the commissioner, which is not said in the act to be final.(m)

(c) *Allen v. Ormond*, 8 East, 4.

(d) *Emson v. Williamson*, cited 11 Vin. Abr. tit. Extinguishment, 440.

(e) *Holmes v. Goring*, 2 Bing. 76;† see ante, § 384.

(f) See Dig. P. ii. tit. Commons (Inclosure.)

(g) *White v. Reeves*, 2 J. B. Moore, 23.^e

(h) *R. v. Parish of Dean* (Comm. of Inclos.), 2 M. & S. 80.

(i) *Thackrah or Thackray v. Seymour*, 1 Cr. & Mcc. 18; S. C., 3 Tyrw. 87.

(k) *Harber v. Rand*, 9 Price, 58.

(l) *Ib.*, recognised in *Logan v. Burton*, 5 B. & C. 513.^t

(m) *R. v. Yorkshire, W. R. (Justices)*, 2 B. & C. 228; see also further as to the construction of Inclosure Acts, *Harper v. Charlesworth*, 4 B. & B. 501; *R. v. Hatfield* (Inhab.), 4 Ad. & Ell. 156; also Dig. P. ii. tit. Commons (Inclosure.)

^aEng. Com. Law Reps. ix. 324.

^tId. iv. 405.

^tId. xii. 303.

^tId. ix. 71.

390. At common law there can be no destruction of a public way, a highway must always continue a highway; *(n)* and if done by Act of Parliament the provisions of the Act must be strictly complied with; *(o)* and by the same authority, ways to a church, &c. may be stopped up; where therefore a discretion was left to the trustees of a turnpike road to leave open roads of that description, and they thought fit to stop up an old way, it was held that if such discretion were exercised by a judge or jury, instead of by the commissioners, it would lead to much litigation and uncertainty. *(p)*

[*346] V. Suspension and Revival of the Right.

§ 391. When Suspension takes Place. | § 392. When Revival takes Place.

§ 391. Ways may not only be totally extinguished, but they may also be suspended according to the duration and nature of the estate in the land and the way. *(q)*

Unity of possession merely suspends a prescriptive easement, there must be unity of ownership to destroy it; *(r)* ⁽¹⁾ therefore, where a party became seised in fee of one set of premises, and took a lease of another set of premises, the owner of which had previously enjoyed an easement in the former, such unity of possession of the land *a quâ* and *in quâ* the easement existed, was held to operate only to suspend, not extinguish the right; *(s)* but during such suspension the way cannot pass under the name of "appurtenance." *(t)*

392. Revival of a right of way does not merely take place after a temporary suspension, but it may also take place in cases of extinguishment by the operation of a new grant. In one case indeed this matter was doubted, for where A. by prescription was to keep a fence between his close and B.'s, and he afterwards purchased B.'s close, laid all into one, and died, and his two daughters made a partition of the two closes, it was demurred in law whether the prescription revived or not; *(u)* but in another case, where a partition took place between two coheirs, and the land, on which there was a way, went to one, and a mill to the other, it was agreed that one should have a passage over the land of the other according to the ancient

(n) Fowler v. Sanders, Cro. Jac. 446.

(o) R. v. Bagshaw, 7 T. R. 363; Harber v. Rand, 9 Price, 58.

(p) De Beauvoir v. Welch, 7 B. & C. 266.^b

(q) James v. Plant, 4 Ad. & Ell. 761; ⁱ S. C., nom. Plant v. James, 2 N. & M. 517.

(r) Canham v. Fish, 2 Tyrw. 155.

(s) Thomas v. Thomas, 2 Cr. M. & R. 34; S. C., 5 Tyrw. 804.

(t) James v. Plant, sup.

(u) Anon., Dy. 295.

(1) Manning v. Smith, 6 Conn. 291.

^bEng. Com. Law Reps. xiv. 42. ⁱId. xxxi. 170.

right; and that this convention between the two sisters, would *operate on the part of her who possessed the way as a new grant; (x) [*347] so, where two closes, one where a right of way existed, and the other to which it was appendant, became the property of an individual who devised the latter with the "appurtenances," held, that this word must be confined to an old-existing right, and had any right passed by this devise, it must have passed as a new easement; (y) so, where a public footway over crown land was extinguished by an inclosure, but the public continued afterwards to use the way for twenty years, such user was deemed not to be evidence of a dedication of the way, unless it appeared to have had the consent of the crown; (z) but where a way has been used for thirty years after its extinguishment, it has been held sufficient to presume a new grant. (a)

VI. Disturbance or Interruption of the Right.

1. Injuries.

§ 393. Disturbance of a Right of Way. | § 394. Interruption of a Right of Way.

2. Remedies.

395. By Abatement of Nuisance,
396. By Action on the Case.
By Action of Covenant.

397. By Arbitration.
By Injunction.
By Mandamus.

1. Injuries.

§ 393. Disturbance of a right of way happens for the most part when a person who has a right of way over another's ground, is obstructed by inclosures or other obstacles, or by ploughing across it, by which means he cannot enjoy his right of way, or at least not in so commodious a manner as he is entitled to do. (b) (1)

*394. Interruption under the prescription Act, 2 & 3 Wm. 4, c. 71, means an obstruction by the owner of the *locus in quo*, but nothing [*348] will amount to an interruption unless acquiesced in for a year; (c) where, therefore, an easement has been enjoyed for nineteen years and a fraction, the right may still be acquired under this act, if an action be brought for an interruption at the end of the twenty years, for the interruption was not acquiesced in for a whole year, so as, under this act, to defeat the twenty years' user; (c) and where a right of way has once been established by clear evidence of enjoyment, it can be defeated only by distinct evidence of interruptions acquiesced in; an unsuccessful attempt from time to time, on the

(x) 21 E. 3. 2; 21 Ass. pl. 1, cited in Bro. Extinguishment, pl. 15.

(y) Whatley v. Thompson, 1 B. & P. 371.

(z) Headlam v. Hedley, Holt, 46.

(a) Keymer v. Summers, Bull. N. P. 74.

(b) 2 Roll. Abr. 140. 341.

(c) Onley v. Gardiner, 4 M. & W. 497.

(1) Query whether an erection of gate be a disturbance. *Capers v. Wilson*, 3 M'Cord, 174.

part of the occupier of the land over which the way ran, to interrupt such right will not be sufficient to get rid of it.(d)

2. Remedies.

395. As a rule, a party may not abate a nuisance, for as in the case of a commoner, he has no interest in the soil and must not meddle therewith; therefore, where by means of the cartwheels belonging to the owner of the land, the way was so full of ruts that it could not be so well used as before, it was held, nevertheless, that the defendant could not justify digging a trench;(e) yet if the way had been utterly denied to him, as if, for instance, he had been shut out, the case would have been different, and he would have pleaded that he could not use the way at all;(f) on the same principle, if the way be foundrous, a man cannot justify going out of the way;(g) it has however been said, in regard to a commoner, that if the injury be done by a stranger, and not by the owner of the soil, the nuisance may be abated by the party having a right of way.(h)

[*349] *396. The most usual remedy for the disturbance of a way is an action on the case;(i)(1) whether it be a way by reservation, grant, or prescription;(k) and although the erection of an obstruction causes no immediate injury to the plaintiff in his use of a right of way, in consequence of his own laches, yet if its existence puts his title in hazard, and prevents him exercising his right whenever he thinks fit to use it, he may have his action.(l) But if the way be a common way, and any man be disturbed in going that way, he shall not have an action upon his case; and this the law has provided, for the avoiding a multiplicity of suits, for if any one man might have it, numbers might have the like.(m) Nuisances on the highways, being public injuries, are punishable by presentment and indictment: though if special damage be laid, the case is different,(n)(2) see further post, INJURIES AND THEIR REMEDIES, also as to pleadings.

397. An action of covenant will lie by a tenant against his lessor for a breach of covenant for quiet enjoyment, by obstructing a way of necessity.(o)

So, differences respecting ways may, like other matters, be referred to arbitration, but in that the award must shew a title to the way.(p)

(d) *Harvie v. Rogers*, 3 Bligh, N. S. 444.

(e) *Dike and Dunstin's case*, Godb. 52.

(f) *Godb.* 53.

(g) See ante, § 370.

(h) 1 Keb. 834.

(i) *Alston v. Pamphin*, Cro. El. 466; *Cantrel v. Church*, Id. 845; see also 3 Lev. 266; 1 Vent. 275.

(k) 1 Roll. Abr. 104.

(l) *Bower v. Hill*, 1 Bing. N. C. 549; S. C. 1 Scott, 527; S. C. 1 Hodges, 45.

(m) 27 H. S. 27; 1 Inst. 56, a.; 5 Co. 73, 104. (n) *Greasly v. Codlin*, 2 Bing. 263.

(o) *Morris v. Edgington*, 3 Taunt. 24. (p) 2 *Harris v. Curnon*, 2 Ch. Ca. 534.

(1) *Wright v. Freeman*, 5 Har. & John. 475.

(2) *Roland v. Wolfe*, 1 Bail. 53, 59. *Peirce v. Dart*, 7 Cow. 609. *Hughes v. Heiser*, 1 Binn. 468; or he may remove or abate the nuisance, doing as little damage as possible, *Beardslee v. French*, 7 Conn. 123; *Arundel McCulloch*, 10 Mass. 70; *Turnpike Co. v. Rogers*, 2 Barr. 114.

*Eng. Com. Law Reps. xvii. 459. Id. ix. 407.

So, where a way is in danger of being destroyed, to the great injury of the parties entitled to the same, an injunction may be obtained for the purpose of staying the mischief.(q)

So, lastly, a *mandamus* may in some cases be applied for *as [*350] being a more efficient remedy, as where a railway was made, by authority of Parliament, and it was declared that the public should use it, but the company took it up.(r)

SECTION VIII.

RIGHT TO WATER AND WATER-COURSES.

§ 398. A right to the use of water is either public or private. The rights connected with public waters have already been treated of (see ante, § 104 *et seq.*, and as far as it is connected with fisheries see ante, § 108.) The private right to running water, so far as this is capable of being reduced to possession, as an incorporeal hereditament, which may be considered—

1. As to the nature and extent of the right.
2. How claimed.
3. How used.
4. Extinguishment of the right.
5. Disturbance of the right and the remedies.

I. Nature and Extent of the Right.

- § 399. Water *publici juris*.
Under what Restriction this is to be taken.
400. Right of Occupancy.
401. Cases in support of the principle :—
Bealey v. Shaw.
402. Saunders v. Newman.
403. Wright v. Howard.
404. Result of the cases.

- § 405. Running Water the subject of different Easements.
Receiving a Flow of Water.
406. Right to discharge Water.
407. Artificial Water-courses.
408. Subterraneous Channels.
409. Private Rights in Navigable Rivers.
410. Watering Cattle.
Landing-Nets.

§ 399. Water, it is said, flowing in a stream, is well settled by the law of England to be *publici juris*, and the person *who first appropriates [*351] any part of this water through his land to his own use has the right to the use of so much as he then appropriates against any other;(s) so, in Williams v. Morland(t) it had been previously said, “Flowing water is originally *publici juris*.” So soon as it is appropriated by an individual.

(q) Newmarsh v. Brandling, 3 Swanst. 99.

(r) R. v. Severn, &c. Railway Company, 2 B. & A. 646.

(s) Liggins v. Inge, 7 Bing. 692. (t) 2 B. & C. 910.

‘Eng. Com. Law Reps. xx. 287. ‘Id. ix. 269.

his right is co-extensive with the beneficial use to which he appropriates it ; subject to that right all the rest of the water remains *publici juris*. The party who obtains an exclusive enjoyment of the water does so in derogation of the primitive right of the public ;(x) and so Mr. Justice Blackstone says, " Water is a movable wandering thing, and must of necessity continue common by the law of nature, so that I can only have a temporary, transient, usufructuary property therein ; so that, if a body of water runs out of my pond into another man's, I have no right to reclaim it ;(y)" but by this it is not to be understood that the first occupier, or first person who chooses to appropriate a natural stream to a useful purpose, has a title against the owner of land below, and may deprive him of the benefit of the natural flow of water ; and consequently it has been held, that the first occupant, though he may be the proprietor of the land above, has no right by diverting the stream to deprive the owner of the land below of the special benefit and advantage of the natural flow of water therein ;(z)(1) and it is said " The object of the judgment in *Mason v. Hill*(a) was to set right the mistaken notion which had got abroad in consequence of certain *dicta* in *Williams v. Morland*,(b) that flowing water is *publici juris*, and that the first occupant of it for a beneficial purpose may appropriate it."(c)

[*352] 400. " The position that the first occupant of running *water for a beneficial purpose has a good title to it, is perfectly true in this sense, that neither the owner of the land below can pen back the water, nor the owner of the land above divert it to his prejudice. In this as in other cases of injuries to real property, possession is a good title against a wrongdoer ; and the owner of the land who applies the stream that runs through it, to the use of a mill newly erected, or other purposes, if the stream is diverted or obstructed, may recover for the consequential injury to the mill."(d)

" But it is a very different question whether he can take away from the owner of the land below one of its natural advantages, which is capable of being applied to profitable purposes, and generally increases the fertility of the soil, even when unapplied, and deprive him of it altogether, by anticipating him in its application to a useful purpose.(2) If this be so, a considerable part of the value of an estate, which, in manufacturing districts particularly, is much enhanced by the existence of an unappropriated stream of water with a fall within its limits, might at any time be taken away ; and, by parity of reasoning, a valuable mineral or brine spring might be abstracted from the proprietor in whose land it arises, and converted to the profit of another."(d)(3)

(x) Per Bayley, J., *Id.* 913. (y) 2 Comm. 8. (z) *Mason v. Hill*, 5 B. & Ad. 24.^c

(a) *Sup.* (b) 2 B. & C. 910.^f

(c) Per Parke, B., in *Arkwright v. Gill*, 5 M. & W. 220.

(d) Per Denman, C. J., in *Mason v. Hill*, 5 B. & Ad. 24 ;^e citing *Rutland (Earl) v. Bowler*, *Palm*. 290, where this same position is laid down.

(1) *Merrit v. Parker*, 1 Cox, 465. *Beisoll v. Sholl*, 4 Dall. 211.

(2) This right cannot be taken away even under the authority of the legislature and consent of the owner of the land above the person injured. *Gardner v. Newburg*, 2 J. C. R. 162. *Cooper v. Williams*, 4 Hamm. 286.

(3) *Merrit v. Brinkerhoff*, 17 Johns. 320 ; and the application of the water to any pur-

^eEng. Com. Law Reps. xxvii. 11. ^f*Id.* ix. 269.

401. In accordance with the principles as above laid down, it had been held in *Bealey v. Shaw*(*e*) that the owner of land through which a river runs cannot, by enlarging a channel of certain dimensions through which the water had been used to flow before any appropriation of it by another, divert more of it, to the prejudice of any other landowner lower down the river, who had before such enlargement appropriated to himself the surplus water which did not escape by the former channel; for "the general *rule of law as applied to this subject is, that, independent of any [*353] particular enjoyment, used to be had by another, every man has the right to have the advantage of a flow of water in his own land without diminution or alteration. But an adverse right may exist founded on the occupation of another.(1) And though the stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking or using it have existed for so long a time as may raise a presumption of a grant, the other party whose land is below must take the stream, subject to such adverse right."(*f*)(2)

402 In *Saunders v. Newman*,(*g*) it was held that the occupier of a mill may maintain an action for forcing back water and injuring his mill, although he had not enjoyed it precisely in the same state for twenty years; and, therefore, it was no defence to such an action, that the occupier had within a few years erected in his mill a wheel of different dimensions, but requiring less water than the old one. "When a mill has been erected upon a stream for a long period of time, it gives to the owner a right that the water shall continue to flow to and from the mill, in the manner in which it has been accustomed to flow during all that time."(*k*) "If a person stops the current of a stream which has immemorially flowed in a given direction, and thereby prejudices another, he subjects himself to an action;"(*i*) as to the period of enjoyment necessary to give this right, see *infra*, § 415; and as to the manner of enjoyment necessary for maintaining the right, see *infra*, § 418 et seq.

403. In *Wright v. Howard*,(*k*) it is laid down: "The right to the use of water rests upon clear and settled principles; *prima facie*, the proprietor of each bank of a stream is *proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor [*354] has an equal right to use the water which flows in the stream, and consequently no proprietor can have a right to use the water to the prejudice of any other proprietor.(3) Without the consent of the other proprietors who

(*e*) 6 East, 208.

(*f*) Per Ellenborough, C. J., in *Bealey v. Shaw*, *sup.*

(*h*) Per Abbot, J., *Ib.*

(*i*) Per Bayley, J., *Ib.*

(*g*) 1 B. & A. 258.

(*k*) 1 S. & St. 190.

pose does not confine or narrow the right to the natural flow, but the party may recover for an infringement of his right, even though no injury arises to his present mode of application. *King v. Tiffany*, 9 Conn. 162.

(1) Post. 360, as to adverse possession.

(2) *Howell v. McCoy*, 3 Raw. 256.

(3) *Arthur v. Case*, 1 Paige, 447; *Vandenburg v. Van Bergen*, 13 Johns. 216—17.

may be affected by his operations, no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, or throw the water back upon the proprietors above. Every proprietor who claims to throw the water back above, or diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years.(l)

404. The opinions expressed in *Williams v. Morland*,(m) and *Liggins v. Inge*,(n) respecting the common right to water, were supposed at one time to be at variance with the doctrine laid down in the preceding cases; but it is said that "the object of the judgment in *Mason v. Hill*,(o) was to set right the mistaken notions which had got abroad in consequence of certain *dicta* in *Williams v. Morland*,(p) that flowing water is *publici juris*, and that the first occupant of it for a beneficial purpose may appropriate it,"(q) it being by that case established that the position in the two former cases is correct, with this qualification only, that by such appropriation no greater right is claimed than to a flow of water in its usual and accustomed course, and it is settled that no appropriation except for such a period as will confer an easement, can diminish the natural rights of other parties.

[*355] 405. Running water is the subject of easements of *different kinds: as a right to receive a flow of water in its accustomed course, a right to interfere with that course, a right to discharge water either in its natural state or changed in quantity or quality, a right to water cattle at a stream or pond filled by a stream.

The easement of receiving water in its accustomed course, is that sort of easement commonly claimed under the name of a water-course, which has caused so much discussion.(r)(1)

406. A right to discharge water on another's land has been recognised in several cases.(2) Thus, a right may be acquired to throw back upon the land of proprietors higher up the stream the water which, unless so forced back, would naturally pass from it;(s) so, a right to let off upon the neighbouring land, water which had been used for the precipitation of minerals, and was thereby rendered noxious;(t)(3) so, although every man is bound to construct his house so that it should not overhang his neighbour's pro-

(l) Per Sir J. Leach, *V. C.*, *Ib.*

(m) 2 B. & C. 910; ^b S. C., 4 D. & R. 583.

(n) 7 Bing. 682; 5 M. & P. 712.

(o) 5 B. & Ad. 24.^d

(p) 2 B. & C. 910.^b

(q) Per Parke, B., in *Arkwright v. Gell*, 5 M. & W. 220.

(r) See ante, §§ 399, 404; also *Frankum v. Falmouth*, (Earl) 6 C. & P. 529.^e

(s) *Saunders v. Newman*, 1 B. & A. 258. (t) *Wright v. Williams*, 1 M. & W. 77.

(1) *Tyler v. Wilkinson*, 4 Mason, 403.

This right is not diminished by user in a particular manner; and an action will lie though all that is necessary for such user remains. *King v. Tiffany*, 9 Conn. 162. *Bud-dington v. Bradley*, 10 Conn. 213.

(2) Increasing a natural discharge is an injury. *Merrit v. Parker, Coxe*, 465. So if the water be detained for a time and then let down in unusual quantities. *Merrit v. Brinkerhoff*, 17 Johns. 306. *Shaw v. Cumminskey*, 7 Pick. 77.

(3) *Howell v. McCoy*, 3 Raw. 269.

^bEng. Com. Law Reps. ix. 269.

^dId. xx. 287.

^eId. xxvii. 11.

^eId. xxv. 526.

perty, and to construct his roof so as not to throw the rain-water upon the neighbouring land ;(u) yet, a right may be acquired by user, to project the wall or eaves over the boundary line of his property, and so to discharge the rain on his neighbour's land ;(x) so, likewise, to discharge water in the neighbouring land by means of a gutter or pipe ;(y)(1) but, a party receiving water drained from a mine, cannot compel the owners of the mine to continue such discharge ; therefore, where certain parties constructed a sough or level, for the purpose of draining their mineral field, and the water from this sough flowed into a brook, the united waters of which turned an ancient corn-mill, after which A. obtained a lease of the brook, of the stream of water issuing from the sough into it, and of *the [356] piece of land on which the corn-mill stood, with the right of erecting mills thereon, which lease contained a proviso, that if, during the term, the stream issuing from the sough, should, by the bringing up of any other sough, or by unavoidable accident, be taken away or lessened, so that there should not come to the mills sufficient to work them, and the lessor should not be able to supply it, it should be lawful for A. to take down the mills and remove them to another piece of ground therein described, of which a lease should be granted for the rest of the term. The sough having afterwards been drained by means of another sough, so that water supplying A.'s mills was thereby diverted, it was held, that, under the circumstances, A. had not acquired by user of the water issuing from the sough, such a right to it as to entitle him to maintain an action against the owners of the second sough, this being an artificial water-course, made for a temporary and particular purpose, and its water having been taken by him, with notice that it might be discontinued, and there being nothing on which to found the presumption of a grant by the owner of the mines, he did not acquire such right by force of the 2 & 3 W. 4, c. 71.(z) A user for twenty years, or more, would afford no presumption of a grant of the right to the water in perpetuity, for such a grant would be neither more nor less than an obligation on the mine owner not to work his mines by the ordinary mode of getting minerals, below the bed drained by that sough, and to keep the mines flooded for the benefit of others.(z)

407. In the absence of any special custom, artificial water courses are regulated by the same rules as natural ones,(2) and a title may be gained by user in the one case as in the other ; therefore, where mine owners made an adit through their lands, to drain which they afterwards discontinued to work, and the owner of a brewery, through whose premises *the water flowed for twenty years after the working had ceased, had, [357] during that time, used it for brewing, it was held, that he thereby gained

(u) 11 H. 7. f. 257.

(x) *Thomas v. Thomas*, 2 Cr., M. & R. 34.

(y) *Baten's case*, 9 Co. 50 ; *Lady Browne's case*, cited in *Shury v. Pigott*, Palm. 446.

(z) *Arkwright v. Gell*, 5 M. & W. 220.

(1) But such right is not acquired by necessity (as from the natural formation of the ground) in case of a conveyance (partition between tenants in common) of city lots. *Bentz v. Armstrong*, 8 W. & S. 40.

(2) In *Manning v. Smith*, 9 Conn. 289, the fact that the water course on vendor's land was an artificial one, was relied on to avoid an implication of the grant of an easement to the vendee of the land to which the water flowed.

the undisturbed enjoyment of the water, and that mines could not afterwards be worked to pollute it.(a)(1) It seems to be questionable whether a universal practice in the neighbourhood, to resume the use of such adit waters for mining purposes, after a long interval, might not have been set up in answer to the claim of easement, thereby raising the inference, that the party claiming used the water not of right, but only during the accidental disuse of the adit, and with knowledge that the mine owners reserved to themselves a power to recommence working, and thereby disturbing the water;(a) so, the proposition that a watercourse, of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be so enjoyed as to confer a right to the use of the water, if proved to have been originally artificial, was held to be quite indefensible.(a)

408. By the term water-course is usually understood a stream of water flowing above ground, but similar questions may arise respecting the right to a flow of water underground. In *Cooper v. Barber*,(b) where a party had for several years pushed back a stream for the purpose of irrigation, in consequence of which the water penetrated through the neighbouring soil. it was held, that no right to cause such percolation was acquired by the user, and the adjoining owner, on sustaining any injury from it to his newly erected house, might bring an action; but in *Balston v. Bensted*,(c) it was held that after twenty years' uninterrupted enjoyment of a spring, an absolute right to it is gained by the occupier of the close in which it issues above ground, and the owner of the adjoining close is not justified in cutting a drain, whereby the supply of water to the spring is diminished.(2)

[*358] *409. In the case of a navigable river, the presumption is that the soil is vested in the crown, yet a subject may claim a prescriptive right to a several fishery in an arm of the sea, even against the crown;(d) and may, by grant(3) or prescription, have the interest in the water and soil of navigable rivers, as the city of London has the soil and property of the Thames by grant;(e) so, special rights in the water have been acquired by way of easement to properties;(f) but a man cannot prescribe to have a necessary easement in the land of another, for himself and his servants to catch fish in his several fishery,(g) for it is there said that though the word easement is known in law, yet in this case the thing itself is set forth, that is, to catch fish, &c., and certainly no instance can be given for such a liberty by such a word or name,(g) see further as to fishery, ante. § 104 et seq.; also common of piscary, ante, § 304.

410. A right in the occupier of an ancient messuage to water his cattle

(a) *Magor v. Chadwick*, 11 Ad. & E. 571;¹ S. C., 3 P. & D. 367.

(b) 3 Taunt. 99. (c) 1 Campb. 463.

(d) *Oxford (Mayor, &c.) v. Richardson*, 4 T. R. 439. (e) *Dav.* 56.

(f) 12 East, 429. (g) *Peers v. Lucey*, 4 Mod. 362.

(1) *Belknap v. Trimble*, 3 Paige, 377.

(2) *Smith v. Adams*, 6 Paige, 442.

(3) But a license so to use a navigable stream is subject to the right of the legislature to make subsequent grants without compensation. *Monongahela v. Koons*, 6 W. & S. 112.

¹Eng. Com. Law Reps. xxxix. 169.

at a pond, and to take the water thereof for domestic purposes, is a mere easement, and not a profit *à prendre* in the soil of another. Such a right may be claimed by reason of the occupation of an ancient messuage, without any limitation as to the quantity of water to be taken; ^(h) so, there may be a right to land and mend nets on another man's ground; ⁽ⁱ⁾ and the acquiescence of the owner may be presumed from circumstances. ^(j)

*II. *How claimed.*

[*359]

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| <p>§ 411. How it may be prescribed for.
How-claimed by custom.
412. Must be by Deed.
413. Grant implied or presumed.
414. Effect of Acquiescence.</p> | <p>415. Upon what length of enjoyment the
Presumption is raised.
416. What passes under a Grant.
What necessary to the validity of a
Grant.</p> |
|---|---|
417. Effect of appropriation.

1. *By Prescription or Custom.*

§ 411. A right to water may be claimed by prescription or custom, by grant, and by appropriation.

An easement in respect of water may be claimed, if not by direct prescription, at least by custom. It is said, "A water-course doth not begin by prescription, nor yet by assent, but the same doth begin *ex jure naturæ*, having taken this course naturally, and cannot be averted;" ^(k) yet it may be claimed by prescription, but if a man prescribe generally for a water-course, and it turns out in evidence that the water has not always run to the plaintiff's house, it has been held that he had failed of his prescription; ^(k) so, it may be alleged as a custom to have a water-course or a washing-place in another man's ground; ^(l) and although a multitude cannot prescribe, yet for an easement they may plead custom; ^(m) but the stanners of Devonshire are not entitled by custom to divert water from streams running into their mines, and for that purpose to dig trenches over other people's lands. ⁽ⁿ⁾

2. *By Grant.*

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412. A grant either express or implied is for the most part the foundation of the right to water, but it requires a deed to create a right and title to have a passage for water; therefore, where one declared in case for obstructing a water-course upon his possession of a mill with the appurtenances, and that by reason of such his possession he had a right to the use

(h) *Manning v. Wasdale*, 5 Ad. & Ell. 764; 5 S. C., 1 N. & P. 172.

(i) *Pain v. Patrick*, 3 Mod. 294.

(j) *Gray v. Bond*, 2 B. & B. 667; 1 S. C., 5 J. B. Moore, 527.

(k) *Per Whitlock, J., Murgatroid v. Law*, Carth. 117.

(l) 3 Mod. 294.

(m) *Ib.* see also *Goodday v. Mitchell*, Cro. El. 441.

(n) *Bastard v. Smith*, 2 Moo. & Rob. 129.

of water running in a certain tunnel, such allegation is not supported by proof that the tunnel was made on the defendant's land, which he had agreed by parol to let the plaintiff have for a certain consideration, because the plaintiff had not the water by reason of his possession of the mill, but by parol license, or contract.(o)(1)

A right of way, or a right of passage for water, (where it does not create an interest in land,) is an incorporeal right, and stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, &c., it lies not in livery but in grant, and a freehold interest cannot be created or passed otherwise than by deed;(p) so, where a subject is owner of a several fishery in a navigable river, where the tide flows and reflows, granted to him (as must he presumed,) before *Manga Charta* by the description of *separalem piscariam*, it being an incorporeal hereditament, a term for years cannot be created in it without deed.(q)

413. A grant may be implied from long user;(2) therefore, where a bill was brought to quiet the plaintiff in the enjoyment of a water-course to his

(o) *Fentiman v. Smith*, 4 East, 107.

(p) *Hewlins v. Skeppam*, 5 B. & C. 221.*

(q) *Somerset (Duke) v. Fogwell*, 5 B. & C. 875.^b

(1) But the right to convey water through the land of another is tangible, and ejectment would lie; and when the agreement though parol, is executed, it is not within the statute of frauds. *Le Fevre v. Le Fevre*, 4 S. & R. 241.

(2) With regard to the right conferred by a user which is adverse to another, and for which an action would at any time lie, there appears to be no difference of opinion; and the statute of limitations applicable to titles to land furnishes an analogous rule for presuming a grant of the right thus used. But the right of a party resulting from a lawful user, not adverse in its character, and for which no action would lie by any one, is the subject of conflicting decisions; all, however, professing to be based upon the same rule of law, to wit, the presumption of a grant. The facts of the cases are nearly identical. The owner of land, through which a stream ran, erected a dam and used the power thus acquired for more than the period required to perfect a title by adverse possession, in no way, however, trespassing on the right of another. The owner of the land lying above on the same stream, erected a dam on his land; and the question was simply whether the erection and use of the first dam gave a right by prescription to the owner below as against all other owners of the land, over which the stream ran. In *Ingraham v. Hutchinson*, 2 Conn. 584, it was held that it did; though the argument was strongly urged that there had been no user adverse to the supra-riparian right, nor any user of any thing that was his, or that he was competent to prevent. But the Court considered there was a prescriptive right to the flow of the water, as it had continued for twenty years. Gould, J., dissented on the ground urged at the bar; and two of the judges concurred, solely on the authority of *Sherwood v. Burr*, 4 Day, 244. That case, however, was a clear one of adverse possession, by throwing the water on plaintiff's land or mill-wheel, by means of a dam, which had been done for the analogous statutory period.

In *Colburn v. Richards*, 13 Mass. 420, the same principle is recognised as that in 4 Conn.; but there was a diversion of the stream by an artificial erection, which gave a right of action, independent of the user for mill purposes. *Cook v. Hale*, 3 Pick. 269, is to the same effect. The remarks of Mr. Justice Story, in 4 Mason, 397, if they countenance this view, are entirely contrary to the general principle laid down by him in 7 Wheat., hereafter noticed; and the case itself is apparently one of adverse user.

On the other hand it has been ruled in *Hoy v. Sterret*, 2 Watts, 327,—and the positions of Mr. Justice Rogers appeared to contain all the argument on the subject,—that no lapse of time, merely, gives any right as against another riparian proprietor, for, 1. Mere occupation gives no right as against a person who at that time had title; all the American cases agree with this. 2. Unless such occupation be continued so long as to afford a presumption of a grant. 3. Which can only arise where there has been an adverse user. 4. This can only be where the user would have subjected the party to an action by him against whom a right is to be thus acquired.

*Eng. Com. Law Repts. xi. 207. *Id. xii. 395.

house and garden through the ground of the defendant, and it appeared that the water-course had been enjoyed for a great length of time, it was held, that it should be presumed that the owner of the house had a right to the water-course, unless the other party *could shew a special license, or an agreement to restrain it in point of time ;(r) so, where a plaintiff had [*361] been in possession of a water-course for upwards of sixty years, and the defendant claimed the land through which the water-course ran by virtue of a forfeited mortgage, the plaintiff's title being proved, and also the fact that the defendant had cut a channel through his own lands, and set up a sluice, whereby the water-course had been diverted, the Court in this case decreed for the plaintiff without sending him to try his right at law.(s)

414. So, the knowledge of the owner of the land and his acquiescence may be presumed from circumstances ; thus, when the lessees of a fishery had publicly landed their nets on the shore at A. for more than twenty years, and had at various times dressed and improved the landing-place, and both the fishery and the landing-place at one time belonged to the same person, but no evidence was offered to shew that he, or those who under him owned the shore at A., knew of the landing of the nets by the lessee, it was held, that it was properly left to the jury to presume a grant of the

(r) *Finch v. Resbridger*, 2 Vern. 390.

(s) *Id.* 391, n. 1; see also *Bush v. Western*, Prec. Ch. 530.

Other cases support this view of the rule :—thus, in *Hurlbut v. Leonard*, Brayt. 201, it is said the prescription does not commence from the erection of the dam, but from the flooding of the land of the other party by means of the dam. *Hathorn v. Stinson*, 3 Fairf. 183, followed *Hoy v. Sterret*, and assumes the same position, without reference to it, however, and, indeed, making the principle still more plain ; for there being a statute forbidding actions, unless there be actual damage from flowage by a mill-dam, it was held, the period to found a presumption did not commence until an actual damage had been sustained, so that an action might have been brought. Indeed, unless there be some other ground on which to base the decision than the presumption of a grant, the raising of such a presumption, from a mere lawful user of the party's property, is so contrary to every authority, that it is difficult to know how the rule should have originated, unless, perhaps, in some ancient local statute or usage, which might be inferred from one often referred to as yet in force, giving extraordinary privileges to persons who will erect mills. A few references to cases on presumptions will show this. Thus, Mr. J. Story, in *Ricard v. Williams*, 7 Wheat. 109, says, "these apply to incorporeal hereditaments, but may be rebutted by contrary presumptions, and can never fairly arise where all the circumstances are perfectly consistent with the non-existence of a grant." So in *McCalmont v. Whitaker*, 3 Raw. 90, Gibson, C. J., says, mere neglect to use gives no right to another, unless there be an adverse user. *Weston v. Adams*, 8 Mass. 136, recognising this rule where there has been no artificial erections, and *Cook v. Hall*, relying on their existence, countenances the suggestion made above. *Reichart v. Scott*, 7 W. 462, is to the same effect, where it was decided, possession by a party wall being lawful, could give no easement. In *Coalter v. Hunter*, 4 Rand. 65, it was said, to found a presumption of the grant of a water-right there must be an enjoyment adverse to the party, excluding the idea of being founded or continued in a loan or favour. If these principles are correct, and they can scarcely be denied, it is difficult to see how the exercise of an undoubted right of damming a stream in its course through one's own land, not diverting it from its course, can give a right against a party not affected by such an act who otherwise had an equal right. And it therefore appears that the criterion to be applied in such cases, is that laid down in *Hoy v. Sterrit*, viz., that such erections, at whatever time they may be made, must be decided on as if simultaneous. The right acquired by the opening of a light on another's ground, which might otherwise be supposed to be adverse to this rule, is explained in *McCalmont v. Whitaker*, 3 Raw. 90, where it is said, being a nuisance from the interruption of privacy, the fact that it was not abated, or an action brought within twenty years, is only to be explained by presuming a grant.

right of such landing to the lessees by some former owner of the shore at A.(t)

But before the 2 & 3 W. 4, c. 71, the acquiescence of lessees would not bind the landlord, nor that of tenants for life, the reversioner; therefore, where A. a tenant for life with power of jointuring, after executing his power, gave a license to B. to erect a weir on his (A.'s) soil for the purpose of watering B.'s meadow, then A. died, and the jointress entered, after which the tenant of A.'s farm diverted the water from the weir, it was held in an action by the tenant of B.'s farm against the tenant of A.'s farm, that [*362] the uninterrupted possession of the water for so many *years, with the acquiescence of the tenants for life, would not affect the reversioner.(x)

415. Before the 2 & 3 W. 4, c. 71, "Twenty years exclusive enjoyment of water in any particular manner, afforded a strong presumption of right in the party so enjoying it, derived from grant or act of Parliament;"(y)(1) but it seems that less than twenty years' enjoyment may or may not afford such a presumption according as it is attended with circumstances to support or rebut the right;(y) as where land is sold with a run of water upon it, the use of the water for less than twenty years will give a man title to it, because the water passes with the land;(z) so, if water has been accustomed to flow along a channel from time immemorial, and it has been appropriated, the first owner of the adjoining land on both sides who appropriates it, without doing injury to any one, either above or below him, acquires such a right by the appropriation that, though he may not have enjoyed it for twenty years, he may maintain an action against any owner of the lands above who wrongfully diverts the water from its ancient channel;(a)(2) but in *Prescott v. Phillip*,(b) it was held that "Nothing short of twenty years' undisturbed possession of water diverted from the natural channel or raised by a weir, could give a party an adverse right against those whose lands lay lower down the stream, and to whom it was injurious, and that a possession of nineteen years, which was shewn in that case, was not sufficient; so, although an adverse enjoyment for the space of twenty years, &c., as against a private individual, is evidence of a grant by him, yet it is otherwise in the [*363] case of a public river navigable by all the queen's subjects, for no *obstruction for twenty years will bar a public right.(c) See further as to the general law of Prescription, post, under that title; also Dig. P. iii. tit. Prescription.

(t) 2 B. & B. 668; 2 S. C., 5 J. B. Moore, 527.

(x) *Bradbury v. Grimsell*, 2 Wms. Saund. 175, n. (d.)

(y) Per *Ellenborough, C. J.*, in *Bealey v. Shaw*, 6 East, 208.

(z) *Canham v. Fiske*, 2 Cr. & J. 126; S. C., 2 Tyrw. 155.

(a) *Frankum v. Falmouth, (Earl)* 6 C. & P. 529.^p

(b) Cited in 6 East, 213, and recognised in *Mason v. Hill*, 5 B. & Ad. 25.^q

(c) *Vooght v. Winch*, 2 B. & A. 662; S. C., 7 East, 199.

(1) *Howell v. M'Coy*, 3 Raw. 262, and then only to a reasonable quantity; and vexatious user is a cause of action. *Hoy v. Sterrett*, 2 W. 332.

(2) *Twiss v. Baldwin*, 9 Conn. 302.

^pEng. Com. Law Reps. vi. 308. ^qId. xxv. 526. ^rId. xxvii. 11.

416. It has been said that by a lease of a weir the soil passes, because the party cannot amend it without the soil.(d) But it is laid down by Lord Coke, that if a man grant *aquam suam*, the soil shall not pass, but the piscary within the water shall ;(e)(1) so, the undertakers of a navigation, in whom the soil is not vested, have a mere easement in the land through which it passes ;(f) but if land be purchased, through which a stream of water runs, the water passes with the land, and although the conveyance be silent as to the water, still the water will pass with the land.(g)

The grantor of an easement of this kind must have such an estate as will enable him to grant the privilege ; therefore, where a person has neither the legal nor equitable estate in the property in respect of which he proposes to grant an easement, the deed will be void, as where one gave license to another to continue a channel or open way through the bank of a river, and the deed imported that the grantor and another could grant the possession of the whole of the river, in such a manner, as that the grantee could insist upon its being kept open during the term, but it afterwards appeared that other parties had an interest in the river, and that the grantors could not dispose of all the water, only of so much as belonged to them, it was held, that although the words of a grant be general, yet where it appears by the deed, that the grantor has a limited interest, the grant will be construed as co-extensive with and limited by the right of the grantor ; and in this instance it appears that the parties had not the power of creating any interest in a real hereditament, because they themselves were not *solely [*364] seised of such an hereditament, being interested jointly with others, and the hereditament could only be granted for a term by all the shareholders, who at least must be tenants in common ; the plaintiff had neither a legal nor an equitable estate, he was only entitled to a share of the profits of the navigation ; the legal estate might have been in other persons ; the equitable estate must have been in the whole body of proprietors.(h)

3. *By Appropriation or Occupancy.*

417. From what has already been stated, it appears clear that there can be no title to water by mere occupancy,(2) (see ante, § 400,) but that continued beneficial enjoyment of a running stream is evidence of the right to have the stream run on in its accustomed course ; and no one can interfere with such accustomed course, unless justified by some grant or license so to do, (see ante, § 399 et seq.) If a mill or other occupation of water be ancient,

(d) 1 Roll. Rep. 259. (e) 1 Inst. 4 b. (f) *Hollis v. Goldfinch*, 1 B. & C. 205.

(g) *Canham v. Fiske*, 2 Cr. & Jer. 126.

(h) *Portmore (Earl) v. Bunn*, 1 B. & C. 694 ;^a see also *Paton v. Brebner*, 1 Bligh, 42.

(1) By the grant of the stream of a river, the right to the perpetual use of the water not merely for fishing, but as a water power, passes. *Bullen v. Runnels*, 2 N. H. 255. 259. *Miller v. Miller*, 15 Pick. 57. *Wheelock v. Thayer*, 16 Pick. 63.

(2) *Merritt v. Brinkerhoff*, 17 Johns. 320. The right of the riparian owner is measured by the difference of the level of the water between the point where the stream enters, and where it leaves his land ; and partial user or non-user in no way affects his right, unless there be an adverse user by another. *McCalmont v. Whitaker*, 3 Raw. 90, ante, § 413 n. 2. *Buddington v. Bradley*, 10 Conn. 319.

^aEng. Com. Law Reps. viii. 62. rId. 188.

it is settled that the owner may maintain an action for any obstruction ; therefore, in *Cox v. Matthews*,⁽ⁱ⁾ it is said, "If a man has a water-course running through his ground, and erects a mill upon it, he may bring an action for diverting the stream, and need not say *antiquum molendenum*;"^(k) and it appears also clear from what follows in this same case, that any appropriation of the water to a beneficial purpose, gives a right to have the stream run on in its accustomed course, so far at least as may be necessary to serve the purpose, for it then added, "upon the evidence it will appear whether the defendant had ground through which the stream ran, before the plaintiffs, and that he used to turn the stream as he saw cause, for otherwise he cannot justify it, though the mill be newly erected;"^(l) and it has since been laid down as a rule, "that after the erection of [*365] works, and the appropriation, *by the owner of the land, of a certain quantity of the water flowing over it, if a proprietor of other land afterwards take what remains of the water before unappropriated, the first-mentioned owner, however he might, before such second appropriation, have taken to himself so much more, cannot do so afterwards."^(m)

III. How Used.

§ 418. Rule of Law as to User generally.

419. Special Cases:—

Weld v. Hornby.

Cooper v. Barber.

420. *R. v. Trafford*.

§ 421. *Menzies v. Bredalbane*.

Exceptions to the Rule.

In case of a Grant.

422. Change of User.

423. Other Cases of Alterations.

§ 418. The user of waters comprehends either the mode of using them, or the length of time that they have been used, as to which latter point, see ante, § 415.

The maxim of law *sic utere tuo ut alienum non lædas*, is peculiarly applicable to a water-course ; therefore, in an early case, if a man should throw down a fosse or hedge where water ran, by which a meadow was surrounded, an assize would lie ;⁽ⁿ⁾ so, in a later case, it was laid down, that if one stop a stream which runs through his land, so that the land of another is thereby surrounded, this is a nuisance to the prejudice of the other party ;^(o) (1) so, if one have an ancient pond, replenished by channels out of a river, it was held, that he cannot change the channels, if prejudice accrue thereby to another, although the effect would be to feed the ponds according to the usage ;^(p) but if a person have ancient pits replenished by a rivulet, he may cleanse them, although he cannot change or

(i) 1 Vent. 237.

(k) Per Hale, C. J.

(l) Ib. See also Dy. 248 b, cited in Luttrell's case, 4 Co. 86.

(m) Per Le Blanc, J., in *Bcaley v. Shaw*, 6 East, 219.

(n) 11 H. 4, 25, 83.

(o) 9 E. 4. 35.

(p) *Duncombe v. Randall*, Hetl. 32.

(1) *Anthony v. Lapham*, 5 Pick. 175. Or rendering it unfit for use by unwholesome substances. *Howell v. McCoy*, 3 Raw. 268.

enlarge them;(g) so, *the occupier of a house, who has a right to have the rain fall from the eaves of it upon another man's land, [*366] cannot put up spouts to collect the rain, and discharge it upon such land in a body;(r) so the building of a new mill by the owner of an ancient water-course may be deemed a nuisance;(s) so, on the same principle, where the owner of land through which a river ran, appropriated a portion of the water by means of a weir of a given height, and a sluice of given dimensions, it was held, that he could not enlarge the sluice so as to appropriate more water to himself, to the prejudice of an owner lower down the stream, who had appropriated the surplus water to his own use.(t)

419. Where, under ancient deed, recognising a right in the owner of an estate to have a weir across a river for taking fish, if it appear that such weir was heretofore made of brushwood, through which it was possible for the fish to escape into the upper part of the river, it was held, that he could not convert it into a stone weir, whereby the possibility of escape through the weir is debarred, though in flood times the fish may still over-leap it.(u)

The enhancing, straightening, or enlarging of an ancient weir, as well as the new erection of one, for the purpose of stopping fish in their passage up the river, is treated as a public nuisance by *Magna Charta*, c. 23, and 12 E. 4, c. 7; and the right to convert a brushwood into a stone weir is not evidenced by shewing that, forty years ago, two-thirds of it had been so converted, without interruption, and the action for the injury having been brought within twenty years after the remaining third was so converted.(u)

The immemorial enjoyment of water will not justify the party who possesses it doing it to the prejudice of *his neighbour, and the rule will extend to a newly erected house; therefore, where a man [*367] had, for many years, penned back a stream for the purpose of irrigating his land, in consequence of which the water penetrated through the soil under ground, and entered the cellar and kitchen of a dwelling-house newly erected, the Court decided, though not unanimously, that he had not by such user acquired a right to persist in penning back the stream to the prejudice of a neighbour, and the owner of the house might have his remedy against him.(x)

420. A proprietor of land adjoining a river, has a right to raise the banks, from time to time, as occasion may require, upon his own land, so as to confine the flood-water within the banks, and to prevent it from overflowing his land, with this single restriction, that he does not thereby occasion any injury to the lands or property of other persons; therefore, where an indictment against the proprietors of land adjoining a river, charged the

(g) *Brown v. Best*, 1 Wils. 174; See also 12 H. 4, 3; *Preston v. Mercer*, Hardr. 60; and *Sly and Mordant's case*, 1 Leon. 247.

(r) *Reynolds v. Clarke*, 2 Ld. Raym. 1399; S. C., 1 Str. 634; S. C., 8 Mod. 272; S. C., Fort. 212.

(s) *Prince v. Moulton*, 1 Ld. Raym. 248; S. C., 2 Salk. 663; S. C., Carth. 386; S. C., 12 Mod. 131; S. C., Comb. 442; S. C., Holt, 192. (t) *Bealey v. Shaw*, sup., see § 417.

(u) *Weld v. Hornby*, 7 East, 195.

(x) *Cooper v. Barber*, 3 Taunt. 99.

defendants with erecting mounds and embankments, whereby the waters of the river were wrongfully forced against an aqueduct belonging to the prosecutors, the proprietors of a canal, to the injury thereof, and judgment had been given for the crown, the court awarded a *venire de novo* on the ground that the special verdict did not state with sufficient certainty, what was the real cause of the penning back of the water in time of flood, as, in order to shew the defendants guilty, it ought to appear distinctly, that the raising the fenders or embankments was not an accustomed and rightful usage, sanctioned by the ordinary right which every man *primâ facie* has to protect his own property, provided he can do so without injury to others; nor, whether the course which the flood-water was stated to have taken, was the ancient and rightful course which it ought to take; and further, that it ought not to have been left in doubt whether the embankment and [*368] aqueduct had not wrongfully turned back more water upon the low lands of the defendants, than was formerly collected in times of flood.(y)

421. So, the proprietor of lands along which there is a flood-stream, cannot obstruct its course by a new water-way, to the prejudice of the proprietor of lands on the opposite side; therefore, where a proprietor of land on the bank of a river, had commenced building a mound, which, if completed, would, in times of ordinary flood, have thrown the water of the river on the land of the opposite proprietor, so as to flood them, he was restrained by a perpetual interdict, in Scotland, from the further erection of such a bulwark, and it was said, on appeal, that "it was clear, beyond the possibility of doubt, that, by the law of England, such an operation cannot be carried on.(z)

But, if there be evidence of a grant, the user of a water-course in a particular manner might be sanctioned, which, but for such evidence, would be illegal; this may be collected from *Cooper v. Barber*,(a) also from *Alder v. Savill*,(b) where it was charged against the defendants, that by a wrongful construction of their flood-gates and machinery, they had so penned up the course of a river, as to occasion an overflow of water upon the plaintiff's farm, but it having been shewn in evidence, that the water of the mill had always flowed over the adjoining meadows, this was deemed to be evidence of a grant; so, where a ditch anciently opened into a stream, but the owner of a mill on the stream kept the opening closed for twenty years or more, without interruption, it was held, that such user would give the mill owner a right to keep it shut, and the owner of the adjoining land would not be justified in re-opening the communication.(c)

[*369] *422. Again, it has been held not necessary that the mode of enjoying a water-course should have always been precisely the

(y) *R. v. Trafford*, 1 B. & Ad. 874; ^e S. C., in error, 8 Bing. 294; ^f 1 M. & Sc. 401; 2 Cr. & J. 265; 2 Tyrw. 201.

(z) *Menzies v. Breadalbane*, 3 Bligh, N. S., 414. 418.

(a) Sup.

(b) 5 Taunt. 454.^s

(c) *Drewett v. Shread*, 7 C. & P. 465.^h

^e Eng. Com. Law Reps. xx. 498. ^f Id. xxi. 272. ^g Id. i. 156. ^h Id. xxxii. 535.

same; (1) therefore where the plaintiff, owner of a mill, claimed a prescriptive right to water which had been accustomed to flow to his mill, and the defendant was charged with keeping a hatch-dam or mill-head at a much greater height than he had been accustomed, so that the water was obstructed from flowing in its usual channel and forced back against the plaintiff's mill, to his great injury, it appeared in evidence that the old mill had been burnt down, and the plaintiff had built the mill in question with a wheel of the same dimensions, and on the same level with the former one, since which time he had erected a new wheel of different dimensions, which required less water, but there was no proof that the owner of the lower mill had received any injury in consequence of altering the wheel; it was held, therefore, that the plaintiff might maintain an action for the injury to his mill, although he had not enjoyed it in that state for twenty years, and it was no defence to such an action that the plaintiff had, within a few years, erected in his mill a wheel of different dimensions, inasmuch as the defendant was not prejudiced thereby; (d) but if the owner of a water-mill, worked by a ground-shot wheel at a low head of water, alter the wheel to a breast-shot wheel, which requires a high head of water, and after that for twenty years and more discontinue the use of the breast-shot wheel, his discontinuance will cause him to lose the right to the high head of water. (e) (2)

423. On the same principle, the change of a mill from a fulling to a grist mill or the like, where no injury was caused to any other person, was held not to destroy the easement; (f) so, not by a trifling alteration in the course of a water-course, as where a party in order to make the enjoyment of a stream that meandered more commodious to himself, varied the course a little by making the water to run in a straight [*370] line; (g) so, the cleansing a water-course will not subject a person to an action if the ancient channels be not enlarged; (h) for the owners of a water-course are bound to keep up due repairs and cleansings; (i) so, in an early case it was said if one were bound to scour a ditch where the water ran, and he neglected so to do, an action of trespass lay. (j) See also 8 H. 7, 5; Morgan v. Evans, (k) Lord Egremont v. Pulman, (l) in which last case the defendant was held liable to the reversioner in case, for the non-repair of a gutter, although the mischief had been occasioned by the reversioner's tenant.

(d) Saunders v. Newman, 1 B. & A. 258.

(e) Drewett v. Sheard, 7 C. & P. 465.^a

(f) Luttrell's case, 4 Co. 86.

(g) Hall v. Swift, 4 Bing. N. R. 38.^b

(h) Brown v. Best, 1 Wils. 174.

(i) Lynn (Mayor, &c.) v. Turner, Cowp. 86.

(j) 11 H. 4, 83.

(k) 2 Lutw. 1515.

(l) Moo. & Malk. 404.^c

(1) Ante, § 405, n. 1. Blanchard v. Baker, 8 Greenleaf, 253.

(2) Hazard v. Robinson, 3 Mason, 273.

^aEng. Com. Law Reps. xxxii. 585. ^bId. xxxiii. 352. ^cId. xxii. 341.

IV. *How Lost.*

§ 424. By destroying the Tenement.
By Relinquishment.

§ 425. No Relinquishment by Unity of Possession.

426. Extinguishment by Act of Party.

§ 424. The pulling down a house for the purpose of repair does not by the law of England, when construed most strictly, cause the loss of any easement attached to it, provided there is evidence of an intention to rebuild it within a reasonable time; (*m*) so, a change in the mode of enjoying an easement does not destroy it. (*n*) But it is said that "what is gained by occupancy may be lost by abandonment;" (*o*) therefore, a license given by the plaintiff, owner of a mill, to the defendant, to cut down and lower the bank, and to erect a weir in a river, whereby part of the water *was [371] diverted from his mill, was held to be a relinquishment of that quantity of water; and after having clearly signified such relinquishment, and suffered others to act upon the faith of such relinquishment, and to incur expense in doing the very act to which his consent was given, an action was not maintainable against the defendant for continuing the weir; (*p*) and it was further said, "Suppose a person, who formerly had a mill upon a stream, should pull it down, and remove the works with the intention never to return, could it be held that the owner of other land adjoining might not erect a mill and employ the water so relinquished? or that he could be compellable to pull down his mill, if the former mill-owner should change his determination and wish to rebuild his own?" (*p*)

425. Though a rent and a way may be extinguished, yet it is otherwise with a water-course, for that is a thing of necessity; therefore, in *Shury v. Piggott*, (*p*) an action was brought for obstructing a stream of water running over the defendant's land to the pool of the plaintiffs, situate in a close which was part of the plaintiff's rectory. The defendant pleaded that the land over which the water ran, and the plaintiff's close, were both part and parcel of the manor of Markham, and that King Hen. 8, being seised of the said manor in his demesne as of fee, granted the land over which the water ran to one under whom the defendant claimed, and the question was, whether the unity of the ownership in the king had extinguished the easement; and it was resolved by the whole Court, that the water-course was not extinguished; (*q*) (1) and it was likened to the case of a warren, or a right to drive

(*m*) *Luttrell's case*, 4 Co. 86.

(*n*) *Hall v. Swift*, 4 Bing. N. C. 381; ^d see ante, § 423.

(*o*) Per Tindal, C. J., in *Liggins v. Inge*, 7 Bing. 682; ^e S. C., 5 M. & P. 712.

(*p*) Per Tindal, C. J., in *Liggins v. Inge*, 7 Bing. 682; ^e S. C., 5 M. & P. 712.

(*q*) *Palm*, 444; S. C. *Poph.* 166; S. C., 3 *Bulst.* 339; S. C., *Noy*, 84; S. C., *Latch*, 153; S. C., *W. Jo.* 145.

(1) *Hazard v. Robinson*, 3 *Mason*, 272. But in the case of an artificial water-course, it has been held, the right being extinguished as an easement by unity of possession, could

^dEng. Com. Law Reps. xxxiii. 382. ^eId. xx. 287.

beasts to pasture in a forest, which rights are not extinguished by unity; and so it is of a gutter, which like a water-course has a separate existence. (q) See *also 11 H. 7, 25, where it was decided, that a customary right in the city of London to have a gutter running in another man's land [*372] was not extinguished by unity of possession.

426. But "if a man hath a stream of water which runneth in a leaden pipe, and he buys the land where the pipe is, and cuts the pipe and destroys it, the water-course is extinct, because he thereby declares his intention and purpose that he does not wish to enjoy them together;" (r) if, however, "A man having a mill and a water-course over his land, sells a portion of the land over which the water-course runs, in such a case by necessity the watercourse remaineth to the vendor, and the vendee cannot stop it." (s)

V. Disturbance of the Right to Water, and the Remedies.

This comprehends first the injuries, and next the remedies.

I. The Injuries.

§ 427. Acts of Disturbance.

428. Right of Obstruction, how acquired.

§ 427. Any act which alters the accustomed course of the water is an obstruction.

If a person stops the current of a stream which has immemorially flowed in a given direction, and thereby prejudices another, he subjects himself to an action; (t) so, for stopping a water-course, by which means his land was drowned; (u) so, for building a mill to the hinderance of the *river; (x) so, for throwing down a weir to the injury of the plaintiff's fishery; (y) [*373] so, for breaking down a pen-stock; (z) so, for putting stake-nets in a river; (a)

(q) Palm. 444; S. C., Poph. 176; S. C., 3 Bulst. 339; S. C., Noy, 84; S. C., Latch, 153; S. C., W. Jo. 145.

(r) Lady Brown's case, cited in Shury v. Piggott, Poph. 170.

(s) Per Dodderidge, J., in Shury v. Piggott, supp.

(t) Saunders v. Newman, 1 B. & A. 258.

(u) Sly and Mordant's case, 1 Leon. 247; S. P., Westborne v. Mordant, Cro. El. 191.

(x) Prince v. Moulton, 1 Ld. Raym. 248; S. C., 2 Salk. 663; Carth. 386; 12 Mod. 131; Comb. 442; Holt, 192.

(y) Weld v. Hornby, 7 East, 195.

(z) Cooper v. Barber, 3 Taunt 99.

(a) 9 E. 4, 35.

not arise as against a grantee of the land without a reservation. Manning v. Smith, 6 Conn. 291.

so, for corrupting a stream of water;(b)(1) so, for diverting a water-course by digging pits or enlarging channels;(c) so, for diverting a course of water to the injury of the plaintiff's mill;(d) so, for straitening a channel, by which the usual flow of the stream is interrupted;(e) so, for making a ditch across a river.(f)

428. But every interference with a water-course claimed by another will not render the author of it liable, for when a person has been accustomed to turn a stream according to his pleasure, he may justify so doing, although it operate to the prejudice of another; this may be inferred from the words of the court in *Cox v. Matthews*,(g) where it is said in reference to the pleadings, "It would appear in evidence whether the defendant had ground through which the stream ran before the plaintiff's, and whether the defendant *used to turn the stream as he saw fit, for that otherwise he could not justify it*;"(h) but this applies only to private rights, therefore, although adverse enjoyment for the space of twenty years is as against a private individual evidence of a grant, yet it is otherwise in the case of a public navigable river, for no obstruction for twenty years will bar a public right.(i)(2)

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* II. The Remedies.

§ 429. What Remedies for Disturbance of the Right.

430. By Act of the Party.

431. Taking reasonable Care.

432. By Action on the Case.

433. Case or Trespass.

434. Right of Election.

435. By Action of Covenant.

436. By Ejectment.

Assizes, &c.

437. By Arbitration.

§ 437. By Relief in Equity.

438. Right of Action, when given.

439. Acquired by Appropriation.

440. Parties to the Action.

441. Party creating or continuing the Disturbance.

442. Request to Party, not the original Creator of the Disturbance.

443. Party in Possession or Reversion.

§ 429. Under this head may be considered first, what remedies may be had for disturbances of the right to water; next, what gives a right of action; and lastly, by whom, and against whom, the remedy may be had.

The remedies to be had in such cases are, either by act of the party, by action, arbitration, or by application to a court of equity.

430. A party entitled to a water-course may redress himself by abating

(b) 13 H. 7, 26; S. C., cited 9 Co. 59.

(c) *Brown v. Best*, 1 Wils. 174.

(d) 22 H. 6, 14, cited 1 Roll. Abr. 107; S. C., cited 3 Ridg. 319.

(e) 48 E. 3, 27. (f) *Biccot v. Ward*, Hob. 193.

(g) 1 Vent. 237.

(h) *Per Hale, C. J.*, Ib.

(i) *Vooght v. Winch*, 2 B. & A. 662. See also *Weld v. Hornby*, sup.

(1) *Howell v. McCoy*, 3 Raw. 269.

(2) *Rung v. Shoenburger*, 2 W. 23. *Commonwealth v. Wiltenberger*, 7 W. 450.

the nuisance, as if a man make a ditch in his land, by which the water accustomed to run to the mill of another becomes diminished, the aggrieved party may fill in the ditch; and it is said that his entry into the land of the offending party is allowable for that purpose; *(j)* (1) so, where the plaintiff had erected a dam for supporting a fish-pond on his own soil, but the dam stopped a rivulet which the defendant enjoyed for the benefit of his cattle, whereupon he entered and abated the nuisance, and the Court refused to set aside a verdict in his favour; *(k)* so, if water runs through the land of a man, and he so stop it in its course as that it surrounds the land of the other, it is competent to this latter to remove the obstacle which *hinders the escape of the water; so, every inhabitant of a vill near which a [*375] stream runs may destroy every impediment to its course, otherwise the place might be inundated; *(m)* and if a lawful water-course be impeded, for want of repair or otherwise, the injured party may quietly abate the nuisance; therefore, where the tenant of a house had a conduit for the purpose of conveying water thereto, which passed through the land of another, it was held, that he might dig the land of the latter for the repair of the pipe; *(n)* and it made no difference that the plaintiff in this case was a grantee of the land, for the land passed *cum onere*; and so, a party might be justified in removing a hatch that impeded the course of the water to his mill, unless it appeared to have been made in exercise of a right. *(o)*

431. In abating a private nuisance, a party is bound to take reasonable care that no more damage be done than is necessary for effecting the purpose; *(p)* but the same care is not necessary in abating a public nuisance; *(q)* yet, in the case of a private nuisance, the party aggrieved will not be answerable for any damage resulting from the act, if he abate no more than is necessary; therefore, where one erected a mill-dam partly on his own land and partly on the land adjoining, upon which the owner of the adjoining land pulled down the part on his own land, and the whole dam fell down, he was held to be justified; *(r)* but he may not abate more than is absolutely necessary; (2) therefore, where the plaintiff had a right to irrigate his meadow by placing a dam of loose stones across the stream, and occasionally a board and a fender, and he fastened the board with two stakes, which he had no right to do, the defendant was held justified in removing the stakes, although not so in *removing the board, *Greenslade v. Halliday*; *(s)* and it was there said, "If a party who has a [*376] right to erect a weir, erects buttresses thereto, although there might be an encroachment on the land of another, which would justify him in pulling

(j) 9 E. 4. 35.

(k) *Raikes v. Townsend*, 2 Smith, 9.

(l) 8 E. 4. 5.

(m) 9 E. 4. 35.

(n) *Guy v. Brown*, Moor. 644.

(o) *Wakeman v. West*, 8 C. & P. 105.^b

(p) W. Jo. 222.

(q) *Lodie v. Arnold*, 2 Salk. 458.

(r) *Wigford v. Gill*, Cro. El. 269.

(s) 6 Bing. 379; *c* S. C., 4 M. & P. 75.

(1) *Colburn v. Richards*, 13 Mass. 420. *Dyer v. Depui*, 5 Whart. 584. He cannot turn the water back on the land of the party increasing the natural flow of the stream by means of ditches. *Williams v. Gale*, 3 Har. & Johns. 231.

(2) *Dyer v. Depui*, 5 Whar. 584. *Williams v. Gale*, 3 Har & Johns. 234.

^bEng. Com. Law Reps. xxxiv. 313.

^cId. xix. 106.

them down, yet he would have no right to pull down or demolish the weir also.”(t) So, the thing complained of cannot be abated until it actually becomes a nuisance; so, that if one see his neighbour erecting that which in all probability will ultimately be such, it cannot be abated as long as it continues inoffensive;(u) but notice ought to be given to the offending party not to proceed, otherwise it is doubtful whether the nuisance can afterwards be abated.(v)

432. The ordinary remedy now is an action on the case; thus, where the owners of property have, by long enjoyment, acquired special rights to the use of water in its natural state as it was accustomed to flow, by way of particular easement to their own properties, and not merely a use which is common to all the queen's subjects, an action on the case may be maintained for a disturbance of the enjoyment;(x) but where the injury, if any, is to all the queen's subjects, the only remedy is by indictment.(y)

433. As to whether the action should be case or trespass, has been a matter of doubt in some cases. The general rule is, that where the damage does not immediately result from the act complained of, it is consequential, and case is the proper form; on the other hand, where the act itself, and not the consequence of it, occasions the mischief, trespass is the proper remedy;(z) therefore, where the *defendant caused water to over-[*377] flow the plaintiff's fishery, by throwing down a weir in the plaintiff's close, this was held to be a plain trespass.(a) On the other hand, where the defendant dug ditches, and so diverted the plaintiff's water out of the river, an action on the case was brought; and it was moved to arrest the judgment, because it did not appear that the diversion of the water was consequential to the digging of the ditches, and therefore that trespass was the proper form; but the Court said, that the injury should be intended after the verdict to have been consequential;(b) so, it has been held that where an injury has been done of a consequential nature, to the comfort and convenience of another, effected partly by an act of trespass, and partly by an act that was not a trespass, but from either of which the injury must and would have resulted, case may be maintained, *Wells v. Ody*;(c) and it was said, in that case, “Suppose a person's premises are injured by the changing of a water-course, by the erection of a weir partly on the land of the plaintiff and partly on the land of the defendant, the erection of that which is on the plaintiff's land would be the subject of an action of trespass, and doing the same thing on the defendant's land would be the subject of an action on the case. If both acts are done at the same time, and form part of one *res gesta*, and the consequential damage is in respect of both together, it appears to me, that the plaintiff may bring his action of trespass,

(t) Per Tindal, C. J., *Ib.*

(u) *R. v. Wharton*, 12 Mod. 510; S. C., Holt, 499; Bridgm. 47.

(v) Com. Dig. tit. Action on the Case for a Nuisance, citing 1 Morg. Vad. Mec. 297.

(x) *R. v. Bristol Dock Company*, 12 East, 429.

(y) *Ib.* See also *Smith's case*, 14 Vin. Abr. 394.

(z) *Reynolds v. Clarke*, 1 Str. 636; *Wells v. Ody*, 1 M. & W. 452.

(a) *Courtney v. Collet*, 1 Ld. Raym. 274; S. C., 12 Mod. 164, cited also 2 Bl. 898.

(b) *Leveridge v. Hoskins*, 11 Mod. 257.

(c) 1 M. & W. 452.

or his action on the case.”(d) But it appears that trespass cannot be joined with case;(e) yet the tenant may bring an action of trespass for the damage to his possession, and the reversioner an action on the case for the damage to the inheritance,(f) for the reversioner cannot bring trespass for an injury to the possession.(f) See further, *infra*, § 443.

*434. The Courts seem to have leaned at all times to the action on the case, or at least to the right of electing either to sue [378] for the trespass, or to waive that and sue for the consequential damage only; thus, in *Whiting v. Beenway*,(g) it was held, that action on the case was maintainable against the defendant, for having erected a weir or bank, by means whereof the water of a certain stream overflowed the plaintiff’s meadow; and it is there said, that the bank was laid as erected *vi et armis*, and not the overflowing, which was the injury there complained of; and in *F. N. B. Trespass*, 87, H., a similar injury was held to be the subject of trespass;(h) and in *Smith v. Goodwin*,(i) it was held, that though trespass might lie, yet a plaintiff was at liberty in every case to waive the trespass, and bring case for the consequential injury.

435. An action of covenant will, it seems, lie for an obstruction to a water-course, where the case will admit of it, although in *Carlisle (Mayor) v. Blamire*,(k) where a party had sold to the corporation of Carlisle so much of the river Caldew running through his lands as should be sufficient for the grinding of corn at all times at the city mills, with a covenant that the grantor should not divert or obstruct any part of the water so granted, it was held, that the defendants, being only devisees of an equitable estate, could not be liable to an action of covenant as assignees.

436. An action of ejectment will not lie for a water-course or rivulet, as such, because the sheriff cannot give possession of a thing which is forever running;(l)(1) therefore, where error was brought on a judgment because ejectment had been maintained *de aquæ cursu*, it was reversed by the unanimous opinion of the Court;(m) but it was said *that such an action would lie for a gorce or pool, because those words compre- [379] hend both land and water;(n) so, where the land under the water does not belong to the plaintiff, but the water, then an action on the case only can be brought for any diversion of it.(n)

Formerly an *assize of nuisance* or a *quod permittat*, or a *præcipe quod reddat*, might be brought for obstructions, but these are among the real actions which have been abolished by the 3 & 4 W. 4, c. 27, s. 36.

(d) Per Lord Abinger, C. B., in *Wells v. Ody*, *sup.*

(e) *Courtney v. Collet*, *sup.*

(f) *Beddingfield v. Onslow*, 3 Lev. 209.

(g) 1 Roll. Abr. 107, citing 22 H. 6. 15.

(h) See also *Brandsecomb v. Bridges*, 1 B. & Cr. 145.p

(i) 4 B. & Ad. 419.

(k) 8 East, 487.

(l) *Adams on Eject.* 20.

(m) *Challenor v. Thomas*, Yelv. 143; S. C., 1 Brownl. 142.

(n) *Ib.*

(1) *Lefevre v. Lefevre*, 4 S. & R. 243.

pEng. Com. Law Reps. viii. 43. qId. xxiv. 89.

437. Rights respecting water-courses may likewise be the subject of reference to arbitration.(o)

So, relief may in some cases be had in equity, where it could not be had at law; thus in the case of *laches*, as where a party stood by and saw his water-course diverted, but instead of preventing it, encouraged the work while it was going on, and afterwards brought his action, the defendant on his application to the Court of Chancery obtained an injunction.(p) *Short v. Taylor*(p) is a similar case, in which Lord Somers also granted an injunction; so, in the case of long possession of a water-course by the plaintiff, the defendant having cut a channel in his own lands and set up a sluice so as to divert the stream, the Court on proof by the plaintiff decreed for him, without sending him to try his right at law;(q) but as a rule, equity will not grant relief until the parties have tried their rights at law;(r) so, if there have been *laches*, and the erections complained of have been suffered to remain any length of time, the Court will not interpose by injunction.(s)

438. As, according to a well-known rule of law, an action on the case [*380] cannot be maintained for a tortious act, *unless the plaintiff shew some actual damage resulting from the act to himself, it has been said that this rule ought to be applied to water-courses, and that therefore the mere obstruction of the water, which has been accustomed to flow through the plaintiff's lands, does not *per se* afford a ground of action, and that it is incumbent on the party complaining of the diversion of the stream to shew that he has sustained some damage thereby, and also that he has applied the water to some beneficial purpose.(t)(1)

439. A person may gain a title to water in some cases by appropriation, and may maintain an action for obstructing it, although he has used the water for less than twenty years, as where he purchases land with a run of water upon it;(u) or, where a proprietor of lands adjoining to a stream has

(o) *Alder v. Savill*, 5 Taunt. 454.

(p) *Anon.*, 2 Eq. Ca. Abr. 523, pl. 3.

(q) 2 Vern. 391, n. 1.

(r) *Whitechurch v. Hide*, 2 Atk. 391.

(s) *Ib.* See further, *Bush v. Western*, Prec. Chan. 536; *Dorset (Duke of) v. Girdler*, Id. 531; *Hilton v. Ld. Scarborough*, 4 Vin. Abr. 425; *Weller v. Smeaton*, 1 B. C. C. 572; S. C., 1 Cox, 102.

(t) *Williams v. Morland*, 2 B. & Cr. 913; S. C., 4 D. & R. 583. But see *Hebblethwaite v. Palmer*, 3 Mod. 48; S. C., nom. *Heblethwait v. Palmes*, Carth. 84; S. C., nom. *Keblethwaite v. Palmer*, 1 Show. 64; S. C., nom. *Palmer v. Keblethwaite*, 2 Show. 243; S. C., nom. *Heblewait v. Palmer*, Holt, 5; S. C., nom. *Palmer v. Heblethwait*, Skin. 65, 175; S. C., nom. *Nulmes v. Hoblethwayte*, 3 Lev. 133, where it was expressly held that an occupier of land might recover for the loss of the general benefit of flowing water, without showing any special use or damage. See also *Mason v. Hill*, (5 B. & Ad. 26,) where the *dicta* in *Williams v. Morland* (sup.) are much discussed. Also ante, § 399 et seq.

(u) *Canham v. Fiske*, 2 Cr. & Jer. 126; S. C., 2 Tyrw. 155.

(1) As the right is acquired by means of an obstruction long enough to give a presumption of a grant, the rule as stated in the text would have the anomalous effect of destroying a right to a future valuable use of property by an adverse user, which at the same time could not be redressed by action. This doctrine has been discussed, ante, § 413, n. 2. See also the remark of *Weston, J.*, in *Blanchard v. Baker*, 8 Greenl. 268, that such a rule would have the effect of making the enjoyment of this species of property dependent on the will of another. See also *Bolivar v. Nepenset*, 16 Pick. 246, that the law presumes damage from such acts. *Butman v. Hussey*, 3 Fairf. 407.

*Eng. Com. Law Reps. i. 156. *Id. ix. 269. *Id. xxvii. 11.

altered the course of the stream, he may maintain an action, although he has not enjoyed it in its altered state for twenty years ;(x) so, the appropriator of a stream that has been accustomed to flow along a channel from time immemorial.(y)

440. The owner of land through which a natural stream of water runs, may, after erecting a mill on his own land, maintain an action against the proprietor of works, for an injury to his mill by a further subsequent diversion of the stream ;(z) for the proprietor of lands contiguous to a stream may, as soon as he is injured by the diversion of the *water, maintain an [*381] action against the party so diverting it.(a)

441. As a rule, an action on the case lies against the person creating the disturbance, whether owner or not ;(b) so, for the party continuing the nuisance ; therefore, where a man fixed a small pipe and cock into a main-pipe, whereby he diverted a watercourse from the house of another, it was held that an action lay against his widow, who, after his death, continued the nuisance ;(c) so, in the case of a feoffment, the feoffee will be held liable, as, where the proprietor was annoyed by the dropping of water from an adjoining house, it was held, that the defendant, a feoffee, was liable, *Rolfe v. Rolfe*, cited in *Beswick v. Combden*,(d) which last was the case of a feoffee continuing the bank of a river so as to overflow his neighbour's ground ; see, however, *Cro. El. 403, 520*, where the case of *Beswick v. Combden* is discussed ; so, a devisee shall have an action for a nuisance commenced in the life of the testator, and continued afterwards ;(e) where, however, the nuisance arises from a neglect to repair, the action can only be maintained against the occupier, and not against the owner of the fee, who is not in possession,(g) unless the nuisance complained of existed before the tenancy commenced,(h) although in some earlier cases this point was not settled.(i) In *Lynn (Mayor, &c.) v. Turner*,(k) which was the case of a corporation bound by prescription to repair a creek, it did not appear in whose possession the creek was.

442. Where the party against whom the action is brought, *was not the original creator of the disturbance, a request must be made [*382] to remove nuisance, before any action is brought ;(l) and the lessee being held liable for the nuisance, although begun in his lessor's time, the request must be made to him.(m)

443. If the nuisance be to the damage of the inheritance, he in reversion shall have an action in respect thereof, and the tenant in possession in

(x) *Mason v. Hill*, 5 B. & Ad. 1.^t (y) *Frankum v. Falmouth (Earl)*, 6 C. & P. 529.^u

(z) *Bealey v. Shaw*, 6 East, 208. (a) *Mason v. Hill*, 5 B. & Ad. 21.^v

(b) *Com. Dig. tit. Action on the Case for a Nuisance.*

(c) *Moore v. Dame Brown*, Ding. 319. (d) *Moor*, 353.

(e) *Some v. Barwish*, *Cro. Jac.* 231.

(g) *Cheetham v. Hampson*, 4 T. R. 318.

(h) *Rosewell v. Prior*, 2 Salk. 460.

(i) *Holbach v. Warner*, *Cro. Jac.* 665 ; *Star v. Rookesby*, 1 Salk. 335. See also *Brent v. Haddon*, *Cro. Jac.* 555.

(k) *Cowp.* 86.

(l) *Penruddock's case*, 5 Co. 101, cited also *Rolfe v. Rolfe*, sup.

(m) *Brent v. Haddon*, *Cro. Jac.* 555.

^t*Eng. Com. Law Reps.* xxvii. 11. ^u*Id.* xxv. 526. ^v*Id.* xxvii. 11.

respect of the damage to the possession; therefore, where in case by a reversioner against the defendant for stopping a rivulet, whereby the plaintiff's close was overflowed and his trees were rotted and perished, it was held to be no defence that an action had been brought against him for the same trespass by a lessee of the premises;(n) but a reversioner must state some damage to the reversion; therefore, where a plaintiff declared as a reversioner of a yard, which the defendant had overhung, so that the water flowed down upon the yard, and thereby it was injured to the damage of the plaintiff, but without stating expressly that his reversion was prejudiced, the court granted a rule in arrest of judgment, on the ground that the plaintiff had not charged that the reversion was prejudiced;(o) so, in a case of building a roof with eaves, so as to discharge water on adjoining premises, it was held to be an injury for which the landlord may recover as reversioner while they are under demise, if the jury think there is damage to the reversion;(p) so in *Bower v. Hill*,(q) it was previously held that a reversioner might maintain an action for any disturbance which in its present form is injurious to the possession, and which in all probability, if left unaltered, would continue to be so on the determination of the particular estate, as [*383] where a stream was choked up for want of cleansing; but *where the disturbance is not of a continuous nature, the reversioner cannot sue;(r) where, however, the disturbance is continued, a fresh action may be maintained from time to time by the person holding the character of tenant in possession or of reversioner, *Penruddock's case*;(s) *Shadwell v. Hutchinson*;(t) and in the latter case it was said, "The ground upon which a reversioner is allowed to bring his action for obstructions, apparently permanent, to lights and other easements which belong to the premises, is, that if acquiesced in, they would become evidence of a renunciation and abandonment." As to pleadings, see post, under that title.

SECTION IX.

RIGHT TO LIGHT AND AIR.

§ 444. Light and air are two important subjects of easements, which from the intimate connexion between them are best considered together, under the following heads, namely,—

1. The nature and extent of the right.
2. How claimed.
3. How used.
4. How lost.
5. Disturbance of the right, and the remedies.

(n) *Beddingfield v. Onslow*, 3 Lev. 209. See also *W. Jo.* 326; *Jesser v. Gifford*, Com. Dig. tit. Action on the Case for a Nuisance. (o) *Jackson v. Pesked*, 1 M. & S. 234.

(p) *Tucker v. Newman*, 11 Ad. & Ell. 40.^a (q) 1 Bing. N. C. 546.^b

(r) *Baxter v. Taylor*, 4 B. & Ad. 72.^c (s) 5 Co. 101. (t) 2 B. & Ad. 97.^d

^aEng. Com. Law Reps. xxxix. 21. ^bId. xxvii. 489. ^cId. xxiv. 26. ^dId. xxii. 33.

I. Nature and Extent of the Right to Light and Air.

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| <p>§ 445. Right to Light and Air on one's own Land.
From adjoining Land.
446. Necessity of Light and Air.
But not of a Prospect.</p> | <p>§ 446. Except by Agreement.
447. Extent of the Right.
448. Case of Windmills.
449. Custom of London.</p> |
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§ 445. The right to light and air depends upon the legal maxim, *cujus est solum, ejus est usque ad cælum et ad inferos*, *for every man on his own land has a right to all the light and air that will come to [*384] him; but this right is strictly confined to that which falls perpendicularly on the land, &c.; the reception of light and air in a lateral direction by the means of windows in a house, is an easement; for although a man may build to the very extremity of his own land, yet within twenty years he acquires no right to light and air from the adjoining land, and it is competent to his neighbour to obstruct the passage of the light and air through his windows, by building against them on his own land, at any time during twenty years after their construction, and thus prevent the acquisition of the easement.(u)(1) But if the light be suffered to pass without interruption during that period to the building so erected, the law implies from the non-obstruction of the light for that length of time, that the owner of the adjoining land has consented, that the person who has erected the building upon his land shall continue to enjoy his light without obstruction, so long as he continues the specific mode of enjoyment which he had been used to have during that period.(u)

446. Light and air being necessary to the right enjoyment of a dwelling, it was held in an early case that an action would lie for obstructing them,(v) unless it were by express agreement of the parties;(v) *sed secus* as to a prospect, which is merely for pleasure;(v) and so, on the authority of this case it was held, in *Knowles v. Richardson*, that building up a wall which merely intercepted the prospect without stopping out the light, was not actionable;(x) so, where a motion was made for an injunction to restrain the defendant from proceeding with a certain building, which would intercept the prospect from Gray's Inn Gardens, and it was alleged that the interposition of the Court was desired, not on the ground of a nuisance, but on a long enjoyment of right to this prospect by the society, Lord Hardwicke *refused to grant an injunction before answer, adding, "I know no rule of common law, which says, that building so as to stop [*385] another's prospect is a nuisance; was that the case, there could be no great towns.... It depends upon a particular right, and then the party must first have an opportunity to answer. There may be such a right as this, as

(u) *Moore v. Rawson*, 3 B. & C. 340.‡

(v) *Aldred's case*, 9 Co. 53.

(x) 1 Mod. 55; S. C., 2 Keb. 611.

(1) And no action lies for the obstruction, even though done merely for the purpose of closing the window. *Mahan v. Brown*, 13 Wend. 261.

‡Eng. Com. Law Reps. x. 99.

in the case of the Act of Parliament touching Lincoln's Inn ; that was upon agreement of the parties, which if it was shewn here, it would be different ;(y) but where the terms of a lease are in other respects complied with, and the lease is silent on the subject of any particular erections, it has been held, that under the circumstances it was not competent to the lessees of certain houses to object to the erection of a statue, on the ground that it would be an obstruction, *Squire v. Campbell* ;(z) and it was there said, " It is not, as is said in one case, (see 1 Dick. 175, and 16 Ves. 342,) because the value of property may be lessened, and it is not, as is said in another case, (see 1 Dick. 175), because a pleasant prospect may be shut out, that this Court is to interfere ; it must be an injury very different, in its nature and origin, to justify such an interference."(a)

447. The right to the use of light may be acquired not only for the convenience of a dwelling, but also for the purposes of trade ; therefore, where a building had been used for a long time as a malt-house, it was held, that no erection could be made which would obstruct the admission of the proper degree of light for the purpose of making malt ;(b) but it appears, that the use of an open space of ground for a purpose requiring light and air, as a timber-yard and saw-pit, for twenty years, did not give a right to preclude the owner of the adjoining ground from building on his land so as to obstruct [*386] the light and air ;(c) and it was said, " If *such a plea could be sustained, it would follow, that a man might acquire a right to the light and air, not only as heretofore, by having been suffered to build on the edge of his property, and suffered for a certain space of time to enjoy that building without interruption, but merely by reason of having been in the habit of laying a few boards on his ground to dry. Such a rule would be very inconvenient, and very unjust."(d)

448. In one of the early cases it was held, that where a house was erected so high that the wind was stopped from the windmills, the house should be dejected, or at least so much of it as occasioned the nuisance.(e)

449. By the custom of London, a man might rebuild his house or other edifice upon the ancient foundation to what height he pleased, though thereby the ancient lights of the adjoining house were stopped, if there were no agreement in writing to the contrary ;(f) but not any other erection upon a new soil, or upon any other foundation ;(g) as to the rights to light under the Prescription Act, see post, § 452 ; also Dig. P. iii. tit. Prescription.

(y) *Attorney-General v. Doughty*, 2 Vez. 452.

(z) 1 My. & Cr. 459.

(a) Per Lord Cottingham, C. 1 My. & Cr. 459.

(b) *Martin v. Goble*, 1 Campb. 322.

(c) *Roberts v. Macord*, 1 Mood. & Rob. 230.

(d) Per Patteson, J., *Roberts v. Macord*, 1 Mood. & Rob. 230.

(e) *Goodman v. Gore*, 2 Roll. Abr. 704, 705.

(f) Com. Dig. tit. London, N., (5).

(g) *Ib.* See also *Winstanley v. Lee*, 2 Swanst. 339.

II. *How claimed.*

§ 450. By Prescription.

In the Case of ancient Windows.

451. By Consent.

§ 452. By Length of Enjoyment.

453. Acquiescence by Person entitled to the Inheritance.

454. By License.

§ 450. Ancient lights may be prescribed for, because light and air are things necessary ;(*h*) so, in *Palmer v. Fletcher*,(*i*) *it was held, that a stranger, having lands adjoining to a house newly erected, may [*387] stop the lights, for the building of a man on his land cannot hinder his neighbour from doing what he will with his own lands ;(1) but otherwise, if the messuage be ancient, so that he has gained a right in the lights by prescription ; and in *Cross v. Lewis*,(*j*) it is said, "A man on his own land may erect a house with windows looking towards his neighbour's premises ; at first they may be obstructed, but if no interruption is offered, he may at length prescribe for them as ancient windows, and claim to have them free from obstruction, as in *Bland v. Moseley*, cited in *Aldred's case*, (9 Co. 57)."(k) So, in *Penwarden v. Ching*,(*l*) it was held, that a window recently erected might have the privilege of an ancient window ; and it is there said, "The question is not whether the window is strictly what is called an ancient window, but whether it is such as the law in indulgence to rights has, in modern times, so called, and to which the defendant has a right, for this is the substance of the plea."(*m*)

451. A right to light and air is not, like a right of common, to be enjoyed on the land of another, and therefore is not properly the subject of grant ; it is acquired by user, and after a time, an agreement not to obstruct the light and air is presumed ; but this is not by way of grant, for the right to insist on their non-obstruction and non-interruption more properly arises by a covenant which the law implies, not to interrupt the free use of these elements.(*n*)

452. The enjoyment of lights for twenty years, without any obstruction from the party entitled to object, has long been held to be a sufficient foundation for raising the *presumption of an agreement not to obstruct them,(2) *Darwin v. Upton*, cited 3 T. R. 159, and ever since this [*388] decision it has been held, that in the absence of any evidence to rebut that presumption, a jury should be directed to act upon it ;(*o*) and since the 2 &

(h) *Aldred's case*, 9 Co. 58.(i) 1 Lev. 122 ; S. C., 1 Sid. 167. (j) 2 B. & C. 686 ;^h S. C., 4 D. & R. 234.(k) Per Holroyd, J., *Ib.* (l) *Mood. & Malk.* 400. (m) Per Tindal, C. J., *Ib.*(n) *Moore v. Rawson*, 3 B. & C. 340.ⁱ(o) Per Bayley, J., in *Cross v. Lewis*, 2 B. & C. 689.^j(1) *Mahan v. Brown*, 13 Wend. 261. *Thurston v. Hancock*, 12 Mass. 220.(2) *Wright v. Freeman*, 5 Har. & Johns. 477 ; *Thurston v. Hancock*, 12 Mass. 225. This rule is doubted as to its application to city lots in this country. 3 Kent's Com. 446, n. b. ; *Hoy v. Sterret*, 2 W. 331.^hEng. Com. Law Reps. ix. 221. ⁱ*Id.* x. 99. ^j*Id.* ix. 221.

3 W. 4, c. 71, s. 3, (see Dig. P. iii. tit. Prescription,) an absolute right to light may be acquired by an enjoyment without interruption for twenty years, as the eighth section of the act, providing for possession during particular periods, does not extend to lights; therefore, a right to lights may be established upon an enjoyment for nineteen years and a fraction, provided the action be brought before the interruption has continued for the full period of a year. (*p*)

453. But, though an uninterrupted possession for twenty years or upwards was held, before the Prescription Act, the 2 & 3 W. 4, c. 71, sufficient to presume a grant or agreement, yet the rule was, and still is, to be taken with this qualification, that the possession was with the acquiescence of the person entitled to the inheritance; therefore, the tenant for life has no power to grant any such right for a longer period than during the continuance of his particular estate; (*q*) and it has been held, that the acquiescence of lessees or tenants for life in the enjoyment of lights did not bind the landlord or reversioner, unless they had knowledge and acquiesced for twenty years. And a presumption against the owner of lands was not so easily inferred in the case of lights, as in the case of rights of way or of common, where the tenant suffered an immediate injury; therefore, an enjoyment of light for more than twenty years, during the occupation of the opposite premises by a tenant, did not conclude his landlord, who was ignorant of the fact, and consequently *will not preclude a succeeding [*389] tenant, who was in possession under such landlord, from building up against such encroaching lights, *Daniel v. North*; (*r*) and it is said, in that case, "The foundation of presuming a grant against any party is, that the exercise of the adverse right, on which such presumption is founded, was against the party capable of making the grant, and that cannot be presumed against him, unless there were some probable means of his knowing what was done against him;" (*s*) so, where lights had been enjoyed for more than twenty years contiguous to land which, within that period, had been glebe land, but was conveyed to a purchaser under the 55 G. 3, c. 147, it was held that no action would lie against such purchases for building so as to obstruct the lights, inasmuch as the rector, who was only tenant for life, could not grant the easement, and therefore no valid grant could be presumed. (*t*)

454. Whether a license by deed is necessary to create a right to have light and air come from the land of an adjoining owner, does not appear to be settled, *Bridges v. Blanchard*; (*u*) for in that case it was only decided, that a license simply to set a ladder on the land of another could not be construed to extend by implication to making a window to look on the premises of the licensor. (*v*)

(*p*) *Flight v. Thomas*, 11 Ad. & Ell. 688; *S. C., 3 Per. & D. 443; 5 Jur. 311.

(*q*) 2 Saund. 175. (*r*) 11 East, 372. (*s*) Per Ellenborough, C. J., *Ib.*¹

(*t*) *Barker v. Richardson*, 4 B. & A. 579. See also *R. v. Bliss*, 7 Ad. & Ell. 554.^m

(*u*) 1 Ad. & Ell. 536;^a S. C., 3 Nev. & Man. 591; *Blanchard v. Bridges*, 4 A. & E. 176.ⁿ

(*v*) *Ib.* See *Winter v. Brockwell*, 8 East, 308, as to a parol license to erect a sky-light, and further, as to licenses, *infra*, § 513 et seq.

¹Eng. Com. Law Reps. xxxix. 200. ¹*Id.* vi. 523. ^m*Id.* xxxiv. 154. ⁿ*Id.* xxviii. 143.

^o*Id.* xxxi. 46.

*III. How Used.

[*390]

§ 455. Effect of Alterations.
456. Altering Buildings.
Martin v. Goble.

§ 456. Garritt v. Sharp.
457. Effect of Consent.
Blanchard v. Bridges.

§ 455. No alteration in the mode of enjoying light and air will be admitted, which tends to deprive the one party of his privilege, or to impose any additional burthen on the other party; therefore, if an ancient window be raised and enlarged, the owner of the adjoining land cannot lawfully obstruct the passage of light and air to any part of the space occupied by the ancient window, although a greater portion of light and air be admitted through the unobstructed part of the enlarged window than was anciently enjoyed, *Chandler v. Thompson*; (x) and it was said in that case, "The whole of the space occupied by the old window was privileged, and it was actionable to prevent the light and air from passing through this, as it had formerly done. That part of the new window which constituted the enlargement might be lawfully obstructed; but the plaintiff was entitled to the free admission of light and air through the remainder of the window, without reference to what he might derive from other sources." (y) In a previous case, (z) it had been held, that there being six lights in an old house, in the new there should be the same number of lights, of the same dimensions and in the same places; and it is there said, "They cannot alter the same to the prejudice of the soil, as if they were before so high as that they could not look out of them into the yard, they shall not make them lower, and the like." (a) So in *Cotterell v. Griffiths*, (b) it was held, that although the plaintiff's windows were darkened *by the blinds being down, yet the defendant having by his act rendered them still darker, the [*301] action was sustainable.

456. So, in *Martin v. Goble*, (c) where a building which had been used as a malt-house for upwards of twenty years was converted into a dwelling-house, it was held, that the house was entitled to the degree of light necessary for a malt-house, and not for a dwelling-house. "The converting it from one to the other, could not affect the rights of the owners of the adjoining ground, no man could, by any act of his, suddenly impose a new restriction on his neighbour." (d)

So, in *Garritt v. Sharp*, (e) where the building in question had been for upwards of twenty years a barn, in which there were several apertures through which light and air passed, and the plaintiff turning the barn into a malt-house, stopped some of the holes, and converted others into lattice-windows, after which the defendant erected a wall which prevented the access not only of any additional light which might have been obtained by the alteration, but also, as the plaintiff alleged, of that quantity which had

(x) 3 Campb. 80.

(z) *Cherrington v. Abney*, 2 Vern. 646.

(c) 1 Campb. 322.

(y) Per Le Blanc, J, Ib.

(a) Per Curiam.

(d) Per M'Donald, C. B., Ib.

(b) 4 Esp. 69.

(e) 3 Ad. & Ell. 325.

been obtained before the alteration; the jury found for the plaintiff, but a new trial was granted, on the ground, that "although the point was made, yet the jury were not required to consider whether the plaintiff had essentially varied the manner in which the light had been enjoyed."

457. So, in *Blanchard v. Bridges*,^(f) where the owner of a house enlarged it and inserted a window at one end in the part added, and at another end carried out the side walls, between which two windows formerly stood in a straight line, five feet, converting this end into a bow, and [*392] inserting *two bow-windows in the same direction, but not in the same situation as the two former, it was held, that whatever privileges against the obstruction of light the two windows of the original house possessed, this privilege did not extend to the three new windows; and in this case it is said, "In whatever way precisely the right to enjoy the unobstructed access of light and air from adjoining land may be acquired, (a question of admitted nicety,) still the act of the owner of such land, from which the right flows, must have reference to the state of things at the time when it is supposed to have taken place; and as the act of the one owner is inferred from the enjoyment of the other, it must in reason be measured by that enjoyment. The consent, therefore, cannot fairly be extended beyond the access of light and air through the same aperture (or one of the same dimensions or in the same position) which existed at the time such consent is supposed to have been given. It appears to us, that justice and convenience both require this limitation. If it were once admitted, that a new window varying in size, elevation, or position, might be substituted for an old one, without the consent of the owner of the adjoining land, it would be necessary to submit to juries questions of degree, often of a very uncertain nature, and upon very unsatisfactory evidence. And in the same case, a party who had acquiesced in the existence of a window of a given size, elevation, or position, because it was felt to be no annoyance to him, might be thereby concluded as to some other window, to which he might have the greatest objection, and to which he never would have assented, if it had come in question in the first instance. The case of *Chandler v. Thompson*,^(g) is not at all inconsistent with this reasoning. There an ancient window had been enlarged; the original aperture remained, and that case only decided that that aperture remained privileged as before the enlargement. We do not forget that the windows in the present case, whatever [*393] their privilege may be, do not *claim it as ancient windows in the ordinary way, from an acquiescence of twenty years; but this circumstance forms no ground of distinction as to the point now under consideration."^(h)

(f) 4 Ad. & Ell. 195; 5 S. C., 5 Nev. & Man. 567.

(g) See ante, § 455.

(h) Per Patteson, J., *Blanchard v. Bridges*, 4 Ad. & Ell. 195; 5 S. C., 5 Nev. & Man. 567.

¹Eng. Com. Law Reps. xxxi. 46. ²Id.

IV. *How lost.*

§ 459. Lost by Non-user.

Moore v. Rawson.

460. What amounts to Non-user.

§ 461. By altering the Mode of Enjoyment.

§ 458. There are two ways by which a right to light and air may be lost, namely, by non-user, and an alteration in the mode of enjoyment.

459. The right to the use of light and air, which a party has appropriated to himself, may be lost by mere non-user for a less period than twenty years, unless an intention of resuming a right within a reasonable time be shewn, when it ceased to be used; (1) thus, where a person entitled to ancient lights pulled down his house, and erected a blank wall in the place of a wall in which there had been windows, and suffered such wall to remain blank for seventeen years, and the defendant erected a building against it, when the plaintiff opened a window in the same place, where there had formerly been a window in the old building, it was held in an action for obstructing this new light, that it lay upon the defendant at least to shew, that, at the time when he so erected the blank wall, and thus apparently abandoned the windows which gave light and air to the house, it was not a perpetual but a temporary abandonment of the enjoyment, and that he intended to resume the enjoyment of those advantages within a reasonable period of time. (i)

*460. "The right to light and air, or water," (it is further said in that case, (k) "is acquired by enjoyment, and will, as it seems to me, continue [*394] so long as the party either continues that enjoyment, or shews an intention to continue it. In this case the former owner of the plaintiff's premises had acquired a right to the enjoyment of the light, but he chose to relinquish that enjoyment, and to erect a blank wall instead of the one in which there were formerly windows. At that time he ceased to enjoy the right in the mode in which he had used to do, and his right ceased with it." (l) So, it has been held likewise, "If a man pulls down a house, and does not make any use of the land for two or three years, or converts it into tillage, he may be taken to have abandoned all intention of rebuilding the house, and consequently his right to the light has ceased. But if he builds upon the same site, and places windows in the same spot, or does any thing to show that he did not mean to convert the land to a different purpose, then his right would not cease." (m)

So, it has been previously held, that completely shutting up windows with bricks and mortar for above twenty years would destroy the privilege; (n) and the plaintiff, by having opened an old window which had

(i) Moore v. Rawson, 3 B. & C. 336; 5 D. & R. 254. (k) Id.

(l) Per Bayley, J., Ib.

(m) Per Littledale, J., Id. 341.

(n) Lawrence v. Obce, 3 Camp. 514.

(1) Corning v. Gould, 16 Wend. 531.

*Eng. Com. Law Reps. x. 99.

been thus blocked up, and thus brought a nuisance upon herself, had no right of action.⁽ⁿ⁾

In *Garritt v. Sharp*,^(o) it was held that a party might so alter the mode in which he has been permitted to enjoy this kind of easement, as to lose the privilege altogether; but as to the effect of alterations in general, see ante, § 455 et seq.

[*395] *V. Disturbance of the Right, and the Remedies.

§ 463. What amounts to an Obstruction.

464. Not always unlawful.

465. When an Obstruction is unlawful.

466. Other Cases.

Compton v. Richards.

467. *Revière v. Bower*.

468. *Coutts v. Boreham*.

469. *Swansborough v. Coventry*.

470. *Blanchard v. Bridges*.

471. Remedies relating to Light and Air.

§ 471. In case of disturbing Privacy.

472. Action on the Case.

473. Parties to the Action.

474. Action against Tenant or Assignee.

475. Injunction.

476. Cases of equitable Jurisdiction.

Winstanley v. Lee.

477. *Ryder v. Bentham*.

478. *Sutton v. Ld. Montfort*.

479. *Bedford (Duke) v. British Museum (Trustees)*.

§ 462. The disturbance of this right is by obstructing the passage of the light and air, which may be considered, first, as to what amounts to an obstruction; next, the circumstances under which the obstruction may take place; and, lastly, the remedy.

463. In order to constitute, by building, an illegal obstruction of the plaintiff's ancient light, it is not necessary to show a total privation of light; if the plaintiff can prove, that by reason of the obstruction, he cannot enjoy the light in so free and ample a manner as he did before it will be sufficient;^(p) the question is, whether, in consequence of the obstruction, the plaintiff has less light than before, to so considerable a degree, as to injure the plaintiff's property in point of value or occupation;^(q) so, where one party has the enjoyment of light, and alterations are made in the adjoining buildings, it must appear that the privation of light is such as to prevent him, if he is in trade, from carrying on his business as beneficially as he had previously done.^(r)

[*396] *464. Every interference with the light and air that may be enjoyed by the owner of an adjoining house is not unlawful; the opening a window, whereby a person's privacy is disturbed, is not actionable;^(s) so, building a wall, or otherwise obstructing a prospect, without obstructing the light, is not actionable.^(t)

⁽ⁿ⁾ *Lawrence v. Obec*, 3 Campb. 514.

^(o) 3 Ad. & El. 325; ^t S. C., 4 Nev. & Man. 834. ^(p) *Cotterell v. Griffiths*, 4 Esp. 69.

^(q) *Pringle v. Wernham*, 7 C. & P. 377; ^s *Wells v. Ody*, Id. 410.

^(r) *Back v. Stacey*, 2 C. & P. 465; ^h S. P., *Parker v. Smell*, 5 C. & P. 438; ⁱ *Pringle v. Wrenham*, sup.; *Wells v. Ody*, sup.

^(s) *Cotterell v. Griffiths*, 4 Esp. 69; *Chandler v. Thompson*, Ib.

^(t) *Knowles v. Richardson*, 1 Mod. 55.

¹Eng. Com, Law Reps. xxx. 104. ²Id. xxxii. 548. ³Id. xii. 218. ⁴Id. xxiv. 401.

465. On the principle that a man cannot derogate from his own grant, it is settled, that where the same person possesses a house, having the actual enjoyment of certain lights, and also possesses the adjoining land, and sells the house to one, and the land to another, yet although the messuage be new, yet no person claiming under the vendor, any more than the vendor himself, can build on the adjoining land, or put piles of timber so as to obstruct the light;(u) and whether the land was sold before the house or afterwards, it was said that it made no difference;(u) and it is not necessary to state, in any action, that the house is ancient, "For if a man should build a house on his own ground, and then grant the house to A., and grant certain land adjoining to B., B. could not build to the stopping of its lights in that case;"(x) so, an action will lie in such case, either against the lessor or the lessee.(y)(1)

466. Upon the same principle, when several adjoining portions of land, on which the building of houses had been commenced, were sold by auction, and by the conditions were to be finished according to a particular plan, it was held, that a purchaser of one of the lots could not, by erecting an additional building at the back of his house, obstruct the light from the windows of another purchaser, who had built his house according to the plan;(z) for it was said, "The purchase must be taken to have [*397] been subjected to certain conditions at the time of sale, and as these unfinished houses were so far built as that the openings, which were intended to be supplied with windows, were sufficiently visible as they then stood, we must recognise an implied condition that nothing would afterwards be done by which those windows might be obstructed, and the purchasers must have taken subject to what then appeared."(a)

467. So, where the owner of a house divided it into two tenements, and demised one of them to the defendant, retaining the other in his own occupation, it was held, in an action against the defendant for obstructing the plaintiff's lights, that the action was maintainable against a person holding as tenant, for an obstruction to a window existing in the landlord's house at the time of the demise, although of recent construction, and although there was no stipulation against the obstruction.(b)

(u) *Palmer v. Fletcher*, 1 Lev. 122; S. C., 1 Sid. 167; 1 Keb. 553.

(x) *Per Hale C. J.*, *Cox v. Matthews*, 1 Vent. 237. 239.

(y) *Rosewell v. Prior*, 6 Mod. 116. (z) *Compton v. Richards*, 1 Price, 27.

(a) *Per Thompson, C. B.*, *Compton v. Richards*, 1 Price, 27.

(b) *Rivière v. Bower*, 1 Ry. & M. 24.

(1) *Story v. Odin*, 12 Mass. 157, S. P. There is an implication of a grant of way from sale, according to a plan on which ways are laid out, necessary or useful for the purposes of the land. *Selden v. Williams*, 9 W. 13. The same principle is applied in case of a license accompanied with costly expenditures. *Lefevre v. Lefevre*, 4 S. & R. 241. *Rerick v. Kern*, 14 S. & R. 267. But whether a party can reserve such a right by implication, thus impairing his own grant, *quare*. In *Manning v. Smith*, 6 Conn. 289, where it was held, a purchase of land having merged an easement in an artificial water-course, on the land of the purchaser, it did not arise by implication on a re-conveyance: it was said, not belonging naturally or necessarily to the land conveyed, it could not pass as appurtenant, and the court would not enlarge the terms of the grant, when the party might have secured himself by proper covenants.

Eng. Com. Law Reps. xxi. 373.

468. So, where the owner of two adjoining houses granted a lease of one of them to B., and afterwards leased the other to C., there then existing in it certain windows, after which B. accepted a new lease of his house, it was held, that B. could not alter his tenement so as to obstruct the windows existing in C.'s house at the time of his lease, although the windows were not twenty years old at the time of the alteration.(c)

469. So, where the plaintiff purchased a house of A., and the defendant at the same time purchased the adjoining land, upon which a building one story high had formerly stood, although in the conveyance to the plaintiff his house was described as bounded by building-ground belonging to the [398] defendant, it was held, nevertheless, that the defendant *was not entitled to build to a greater height than one story, if by so doing he obstructed the upper windows of the plaintiff's house ;(d) and it was said, "It is well established by the decided cases, that where the same person possesses a house having the actual use and enjoyment of certain lights, and also possesses the adjoining land, and sells the house to another person, although the lights be new, he cannot, nor can any one who claims under him, build upon the adjoining land, so as to obstruct or interrupt the enjoyment of those lights. The sales to the plaintiff and defendant being sales by the same vendor, and taking place at one and the same time, we think the rights of the parties are brought within the application of the general rule of law."(e)

470. In *Blanchard v. Bridges*(f) it was held, that no license of covenant from A., the owner of the adjoining land, to put out or not to obstruct the windows in the house of B., is to be inferred from the circumstance of A.'s being a party to the deed by which the house with the windows in it was conveyed to B., and by which deed A. conveyed part of the adjoining land to B., or from the circumstance of A.'s witnessing, without objection, the progress of the building ; so, likewise, where A., in licensing B. to build to the extremity of B.'s ground, adjoining that of A., expressly reserved to himself the right of building to the extremity of his own ground, when he should think proper so to do, it was held, that A. might, at any time within twenty years, build to the extremity of his own land, though he thereby rendered the house of B. dark, damp, and unhealthy.(f) If a party who has neglected to secure to himself the unobstructed enjoyment of light and air to a new window, by previous express license or covenant, upon any thing short of twenty years' acquiescence, the onus lies upon him to produce such evidence clearly and conclusively to the inference of a license or covenant.(f)

[399] *471. The injuries relating to the enjoyment of light and air are either such as arise from a person's putting out windows to the prejudice of his neighbour's privacy, or, which is more commonly the case, by interrupting others in the enjoyment of that light and air to which they are

(c) *Coutts v. Gorham*, 1 Mood. & Malk. 396.

(d) *Swansborough v. Coventry*, 9 Bing. 305 ; 2 M. & Sc. 362.

(e) Per *Tindal, C. J.*, *Ib.* (f) 4 Ad. & Ell. 195 ; 5 Nev. & Man. 567.

. 4 Eng. Com. Law Reps. xxii. 338. 1 Id. xxiii. 286. 1 Id. xxxi. 46.

entitled; in the first of these cases, where a party's privacy is disturbed by his neighbour throwing out a window to overlook his premises, there appears to be no other remedy than to build on the adjoining land opposite the offensive window, *Chandler v. Thompson*; (g) and it is there said, "Although an action for opening a window to disturb the plaintiff's privacy was to be read of in the books, I never knew such an action maintained; and when I was in the Common Pleas, I heard it laid down by Lord C. J. Eyre, that such an action did not lie." (h)

472. In the latter case above mentioned, when a party has acquired a right to the use of light, an action on the case lies for obstructing it; (i) and the like remedy lies for rendering the air impure, as by the smell of hogs, (i) and in this latter case the right of action lies not only for the disturbance of an easement, but also for an injury to the common law rights of property. (k)

But every interference with the full enjoyment of an easement will not amount to a disturbance so as to sustain an action; it must be some sensible abridgment of the enjoyment; it is not sufficient that a ray or two of light is obstructed. (l)

473. An action may be maintained by a reversioner for the obstruction of lights, for if he were prevented from suing for such an injury during the continuance of the particular estate, he might have great difficulty in proving his right when he came into possession; (m) and the ground upon *which a reversioner is allowed to bring his action for obstruction, [400] apparently permanent, to lights and other easements which belong to the premises, is, that, if acquiesced in, they would become evidence of renunciation and abandonment; (n) so, if the erection which caused the obstruction in the first instance was an injury to the reversion, on any ground on which it can be put, the continuance was held necessarily to be so likewise. The continuance of the obstruction would in fact render the proof of title more difficult at a future time, notwithstanding the former recovery; (o) and in *Jesser v. Gifford*, (p) which was an action by a reversioner for obstructing lights, it was held, that the tenant might bring the action in respect of the injury to his possession, and the reversioner in respect of his reversion, see further, ante, § 443.

474. The owner of the inheritance may bring an action against the tenant for a nuisance in obstructing lights and breaking his wall, (q) and the action may be brought not only against the party who erected the nuisance, but also against his lessee or assignee for continuing it; therefore, where a lessee for years of a piece of ground adjoining to an ancient messuage with ancient lights, whereof the plaintiff was possessed for years, erected a house

(g) 3 Campb. 82.

(h) *Per Le Blanc, J.*, *Ib.*

(i) *Aldred's case*, 9 Co. 59 a.

(k) *Bliss v. Hall*, 6 Scott, 500.

(l) *Cotterell v. Griffiths*, 4 Esp. 69. See further, ante, § 462.

(m) *Schadwell v. Hutchinson*, 1 Mood. & Malk. 300.

(n) *Bower v. Hill*, 1 Bing. N. C. 555.

(o) *Schadwell v. Hutchinson*, 2 B. & Ad. 97.

(p) 4 Burr. 2141.

(q) *Tomlinson v. Brown*, Say. 215; S. C., cited 2 Burr. 2142.

¹Eng. Com. Law Reps. xxii. 33. ²Id. xxvii. 489. ³Id. xxii. 33.

thereupon, whereby the plaintiff's lights were stopped, for which the plaintiff brought a former action and recovered damages, after which the defendant granted over the ground, with the nuisance, to another, it was held, that an action lay for the continuance, and might be brought against either ;(r) but he who does the first wrong shall be answerable in damages ;(r) and though the action lies against either, yet there shall be one satisfaction ;(r) and an action will lie not only against the principal, but also against the managing [*401] clerk who *superintends the erection of any nuisance ; therefore, in an action on the case for obstructing the plaintiff's lights, it was held that a clerk who superintended the erection of the building by which they were darkened, and who alone directed the workmen, might be joined as a co-defendant with the original contractor ; *Wilson v. Peto and Hunter*,(s) where it is said, "In cases of that description, the action must be brought either against the hand committing the injury, or against the owner for whom the act was done ;" but intermediate and subordinate persons are expressly exempted from responsibility by this case.

475. A Court of equity will grant an injunction to restrain any erection likely to darken or obstruct the ancient lights of any house ;(t) and it will be granted on affidavit of notice, but not on a motion in support of a particular right to a prospect ;(u) and the right to lights, as the ground for an injunction to stop the erection of buildings, must be founded on prescription, or else on some agreement or a reasonable presumption of one ;(v) so, the foundation of the jurisdiction to interfere by injunction must be such material injury to the comfort of those who dwell in the neighbouring house, as to require the application of a power to prevent, as well as to remedy an evil for which damages, more or less, would be given in an action at law.(x) "The position of the building, whether opposite, at right angles, or oblique, is not material. The question is, whether the effect is such an obstruction as the party has no right to erect, and cannot erect without those mischievous consequences, which upon equitable principles should be not only compensated by damages, but prevented by injunction. [*402] I repeat the observation of Lord Hardwicke,(y) that a *diminution of the value of the premises is not a ground ; and there is as little doubt that this Court will not interpose upon every degree of darkening ancient lights."(z)

476. Courts of equity will restrain the erection of buildings which would cause irreparable injury, as loss of health, loss of trade, or destruction of the means of existence, without waiting the slow process of establishing the legal right, when delay itself would be a wrong ; but the plaintiff is bound to shew not only a legal right to the enjoyment of the ancient lights, but

(r) *Rosewell v. Prior*, 6 Mod. 116 ; 12 Mod. 635 ; S. C., 2 Salk. 459 ; S. C., Comb. 481 ; S. C., Carth. 454 ; S. C., Holt, 500 ; S. C., 1 Ld. Raym. 392.

(s) 6 J. B. Moore, 47,^w recognizing *Stone v. Cartwright*, 6 T. R. 411.

(t) *Back v. Stacey*, 2 Russ. 121.

(u) *Attorney-General v. Dougherty*, 2 Vez. 453.

(v) *Morris v. Lessees of Lord Berkeley*, 2 Vez. 452.

(x) *Attorney-General v. Nichol*, 16 Vez. 338.

(y) 1 Dick. 164.

(z) *Per Eldon, C., Attorney-General v. Nichol*, 16 Vez. 338.

that, if the defendant is permitted to proceed, such an injury will ensue as will warrant the Court in interposing; (a) and the Court will not interpose on certificate of a bill filed before answer, unless the injury is of a nature so pressing as not to admit of delay. (a)

477. In *Ryder v. Bentham*, (b) an injunction against erecting certain blinds, so put up as to obstruct plaintiff's lights, was granted, until trial of the right at law; but the Court would not, on motion, make an order to pull down what had been already erected; so, in *Attorney-General v. Nichol*, (c) the Court granted, under the circumstances, an injunction to restrain the obstruction of ancient lights before appearance, and without notice, on an affidavit filed, even although plaintiff had previously commenced an action at law; see also *S. C.*, 16 Ves. 338, where this injunction was also dissolved, on defendant's undertaking to remove the obstruction if the verdict should be against him; see also *Chalk v. Wyatt*. (d)

478. An injunction was granted to prevent the stopping of ancient lights against the lessee of an ecclesiastical corporation, subject to the plaintiffs' establishing their right to an *easement in an action; (e) and upon a motion to dissolve the injunction, it was said, "As far as the model [*403] gives me any information upon the subject, and so far as I can form a conception from the dimensions of the intended buildings as they have been stated in the affidavits, I entertain no doubt whatever that the comfort of those who live in the houses now occupied by Mr. Tutton and Miss Jelfe would be most materially affected. I have, therefore, a case before me, in which, according to my own opinion, the building, if completed, would be a nuisance, and in which it is not by any means clear that the Dean and Chapter of Westminster would have a right to erect the building proposed, and in which it appears that Lady Montfort may not have the right, though the Dean and Chapter may have it. I think, therefore that the injunction must be continued, but the matter must be tried." (f)

479. Where land is conveyed in fee, by deed of feoffment, subject to a perpetual ground-rent, and the feoffee covenants for himself, his heirs, administrators, and assigns, with the feoffor, the owner of the adjoining lands, his heirs, executors, administrators, and assigns, not to use the land in a particular manner, with the view to the more ample enjoyment by the feoffor of such adjoining lands, and the subsequent acts of the feoffor, or those claiming under him, have so altered the character and condition of the adjoining lands, that, with reference to the land conveyed, the restriction in the covenant ceases to be applicable, according to the intent and spirit of the contract, a Court of equity will not interpose to enforce the covenant by granting an injunction to restrain the erection of additional buildings, but will leave the parties to their remedy (if they have any) at law. (g)

(a) *Winstanley v. Lee*, 2 Swanst. 335. (b) 1 Vez. 543. (c) 3 Mer. 687. (d) *Id.* 688.

(e) *Sutton v. Lord Montfort*, 4 Sim. 559, recognizing *Attorney-General v. Nichol*, 16 Ves. 338.

(f) Per Sir L. Shadwell, V. C. *ib.*

(g) *Bedford (Duke) v. British Museum (Trustees)*, 2 My. & K. 552.

[*404]

*SECTION X.

RIGHT TO PEWS AND OTHER EASEMENTS.

§ 480. There are several rights, which have been admitted either as prescriptive rights, or such as may be claimed by a grant, express or implied, which, as they are to be enjoyed on the land of another, have been classed among the number of easements; of these, the right to a pew or seat in the church deserves the first consideration.

I. Right to Pews.

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| <p>§ 481. No property in pews.
May be claimed by Prescription or a Faculty.</p> <p>482. Disposition of the Seats.</p> <p>483. Right of the Churchwardens.
Duty of the Churchwardens.</p> <p>484. Particular Rights.
Prescriptive Right.
Appendant to a house, not to Land.
Pew cannot be severed from the House.</p> <p>485. Prescriptive.
Apportionable.</p> <p>486. Priority of a Seat to be prescribed for.</p> | <p>§ 487. Prescription, how to be proved.
Evidence from Reparation.</p> <p>490. Faculty.
Different Kinds.</p> <p>491. Faculty revocable.</p> <p>492. Faculty may be presumed.</p> <p>493. Possessory Right to a Pew.</p> <p>494. What is a Disturbance, and its Effect.
Right triable at Common Law.</p> <p>495. No Suit in Spiritual Court when Prescription is in question.</p> <p>496. When the Ordinary has Cognisance.</p> <p>497. Perturbation of Seat.</p> |
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Under this head may be considered, first, how claimed; and, in the next place, disturbance of the right, and the remedies.

1. How claimed.

§ 481. At common law there is no property in pews, they are erected for the use of the parishioners. The ordinary may by a faculty grant a pew [*405] to a particular person while he resides *in the parish, or there may be a prescription which presupposes a faculty; but as to personal property in a pew, the law knows no such thing.^(h) Every man who settles as a householder has a right to call on the parish for a convenient seat.⁽ⁱ⁾

Although of common right the soil and freehold of the church is in the parson.^(k) yet the use of the body of the church and its repairs belong to the parishioners, and the disposing of the seats therein belongs to the ordinary, and therefore no one can claim a peculiar seat without special reason.^(k)

The parson, or rector impropriate, is entitled to the chief seat in the chancel;^(l) but a grant of part of the chancel by a lay impropriator has been held not good.^(m) "If this grant were good, it would take the chancel out of the jurisdiction of the ordinary."⁽ⁿ⁾

(h) 3 Phill. 15.

(i) 1 Consist. 194.

(k) Boothby v. Baily, Hob. 69.

(m) Clifford v. Wicks, 1 B. & Ad. 498.

(l) Hall v. Ellis, Noy, 153.

(n) Per Bayley, J., lb.

482. Parishioners are not at liberty to chose what seats they like ; the distribution of seats among them rests in the discretion of the ordinary, who, it is said, may place and displace whomsoever he pleases.(o) This discretion is commonly exercised by the churchwardens, who are the officers of the ordinary, as well as those of the parish.(p) To exclude the ordinary from his jurisdiction, it was necessary, before the Prescription Act, 2 & 3 W. 4, c. 71, not merely that a possession should be shown for many years, but that the pew should have been built and repaired time out of mind.(q)

483. By custom, the church wardens may have the ordering of the seats, as in London,(r) and such a custom will be *good, and a prohibition will lie if the ordinary interpose ;(s) and the churchwardens must [*406] show some particular reason why they are to order the pews exclusively of the ordinary, for a general allegation, that the parishioners have used to repair and build all the seats in the church, and by reason thereof the churchwardens have used to order and dispose the seats, is not sufficient to take away the ordinary's power in disposing and ordering the seats, because this is no more than the parishioners are bound to do of common right, to wit, building and repairing the seats, for which they have the easement and convenience of sitting in them.(t)

The authority of the churchwardens must be exercised justly and discreetly, or they may be corrected by the ordinary.(u) They should place the parishioners according to their station ;(x) and they cannot exercise this right in opposition to every legal and equitable claim.(y)

484. A right to a pew in a church is an easement,(z) and a person claiming such right must show either a faculty or a prescription.(a) It must be claimed as an appurtenant to a messuage within the parish, and the occupancy of it must pass with the house, and the individuals cannot, by contract between themselves, defeat the general right of the parish ;(b) so, a faculty is only to the first grantee, and cannot be transferred by him,(c) for a seat in the church belongs not to the person, but to the house, and therefore a grant to a man and his heirs is bad in point of law ;(d) so, where there is a prescriptive right, it cannot be exercised *by transferring [*407] to persons not inhabitants of the house or parish.(e)

So, a seat cannot be claimed by prescription as appendant to land, but to a house, for the seat belongs to the house in respect of the inhabitants thereof.(f) Extra-parochial persons, therefore, cannot establish a claim to a seat in the body of a parish church without proof of a prescriptive title, if

(o) 2 Roll. Abr. 288.

(p) 1 Phill. 316; 1 Hagg. 394.

(q) *Storks v. Booth*, 1 T. R. 428; 1 Consist. 332.

(r) *Wats. C. L.*, c. 39.

(s) 2 Roll. Rep. 288; but see contra, *Presgrave v. Shrewsbury* (Churchwardens,) 1 Salk. 167.

(t) *Wats. C. L.*, c. 39.

(u) *Willie v. Mott*, 1 Hagg. 33.

(x) 1 Phill. 323.

(y) 3 Phill. 516, n.; and see further, *Burn's E. L.*, Phill. ed., 359, a, b.

(z) 3 Inst. 302.

(a) 1 Consist. 322; *Fuller v. Lane*, 2 Add. 247; *Fry v. Flood*, 2 Curt. 356.

(b) 2 Consist. 319.

(c) *Stocks v. Booth*, 1 T. R. 428.

(d) *Langley v. Chute*, T. Raym. 246. See also *Rogers v. Brook*, cited 1 T. R. 431,

n. (a). (e) 2 Consist. 319.

(f) 1 Inst. 121, b.; *Gibbs*. 222.

they can establish it even by prescription ;(*g*) but a pew in an aisle or chancel may belong to a non-parishioner, (*h*) for the case of an aisle or chancel depends upon, and is governed by, other considerations ;(*i*) and in *Davis v. Witts*, (*k*) it was held, that a pew in the aisle of a church may be prescribed for as appurtenant to a house out of the parish.

There is no such thing as a right to a pew in gross or at large ; it is a right which can only be held as appurtenant to a messuage, and enjoyed by a person only so long as he continues to inhabit such messuage ;(*l*) therefore, a pew annexed by prescription to a messuage cannot, as has been erroneously imagined, be severed from the occupancy of the house, but passes with the messuage, the tenant of which for the time being has *de jure* the prescriptive right to the pew, (*m*) and it cannot be sold or let without an Act of Parliament ;(*n*) therefore, where an occupier of a pew ceases to be an inhabitant of a parish, he cannot let the pew with, and thus annex it to his house, but it reverts to the churchwardens for their disposal ;(*n*) and a custom pleaded that pews are appurtenant to certain houses, and are let by the owner to persons who are not inhabitants of the parish, is bad ;(*o*) so, a permission by churchwardens for a person to sit in a pew temporarily, in order by [*408] keeping possession for *the future tenant to carry into effect the conditions of sale of a house, is illegal as confirming a sale of the pew ;(*p*) but if a house to which a pew is appurtenant be let to a parishioner, in that character he is clearly entitled to the pew. (*q*)

485. The right in a particular pew, when created by a faculty, may be apportioned ; therefore, where a faculty was granted to a man and his family, as owner and occupier of a certain dwelling-house, and the house was afterwards divided, the occupier of one part of the dwelling-house, though a very small part, was held to have some right, and therefore might maintain an action against the churchwardens for disturbing him in the enjoyment of it, *Harris v. Drewe* ;(*r*) and it was there said, the plaintiff having a right to use the pew, the churchwardens had no right to interfere as they did, and they were wrong-doers. "It may certainly happen, in consequence of a house having been subdivided, that three or four families may become entitled to the use of a pew belonging to the original messuage, and they may require more accommodation, and a question may arise how many persons are entitled to use the pew in respect of each of the subdivisions. That is, however, a matter to be settled among themselves." (*s*)

486. As a seat in a church may be prescribed for, so also may a priority of seat ; thus it was declared in the case of *Carlton v. Hutton*. (*t*) The Archbishop of York sent an inhibition to Carlton, until the matter should be determined before him, but prescription was surmised, and thereupon prohibition obtained, because as well priority of seat, as the seat itself, may be

(*g*) *Byerley v. Windus*, 5 B. & C. 1 ; S. C. 7 D. & R. 564. See also *Hallack v. Cambridge University*, 1 G. & D. 100.

(*h*) *Barrow v. Keen*, 1 Sid. 361.

(*i*) 2 Add. 427. (*k*) *Forr*. 14.

(*l*) *Mainwaring v. Giles*, 5 B. & A. 360.^b

(*m*) 1 Hagg. Cons. 319.

(*n*) 1 Hagg. Rep. 319.

(*o*) 1 Hagg. Cons. 317.

(*p*) *Blake v. Usborne*, 3 Hagg. Rep. 726.

(*q*) 2 Add. 428.

(*r*) 2 B. & Ad. 164.^c

(*s*) *Per Littledale, J.*, *ib.*

(*t*) *Noy*, 78 ; S. C., *Palm*. 424 ; S. C., *Latch*, 116.

^aEng. Com. Law Reps. xi. 137.

^bId. vii. 129.

^cId. xxii. 50.

claimed by prescription;(u) so, priority in a seat in the body or aisle of the church may be *appropriated, and belong to a house, by faculty or [*409] prescription, which presupposes a faculty.(x)

487. It is necessary in the case of prescription to shew, that the use and occupation of the seat have from time immemorial been appurtenant to a certain messuage;(y) a prescriptive right must be clearly proved, the facts must not be equivocal, and they must be such as are not inconsistent with the general right.(y) Where a prescription is interrupted, a jury is not bound to presume a faculty from long undisturbed possession.(z)

488. Reparation from time to time is necessary to be pleaded and proved, in order to make out a prescription;(u) if, therefore, a person prescribe that he and his ancestors, and all they whose estate he hath, have used to sit in a certain seat in the nave of the church time out of mind, in consideration that they have used time out of mind to repair the said seat, this is a good prescription, and the ordinary cannot displace him;(b) so, if any repairs have been required within memory, it must be proved that they have been made at the expense of the party setting up the prescription. The *onus* and *beneficium* are supposed to go together; mere occupancy does not prove the right,(c) and mere repairing for thirty or forty years will not exclude the ordinary;(d) so, lining and putting new cushions into pews are not repairs, but mere ornament; these are not usually done by the parish.(e)

489. In courts of common law mere occupation or user, or as it is more properly called, possession, if long continued, *has been considered sufficient evidence for a jury to presume a faculty; therefore, in [*410] *Rogers v. Brooks*,(f) a thirty-six years' exclusive possession was held sufficient presumptive evidence of a prescriptive right, although the church had been rebuilt about forty years before; but in *Stocks v. Booth*(g) it was held, that possession for above sixty years of a pew in a church was not a sufficient title to maintain an action upon the case for disturbance in the enjoyment of it, and that the plaintiff must prove a prescriptive right or a faculty, and should claim it as appurtenant to a messuage; so, in *Griffith v. Matthews*,(h) where there was thirty years' mere possession, the seat, which was before open, having been built and inclosed during that time, it was left to a jury to consider whether, under all the circumstances of the case, this pew so erected was appurtenant to the plaintiff's messuage; the jury found for the defendant and the Court refused a new trial. It was there said, "If it had not appeared when and at whose expense this pew was built, or that it had not been a pew before 1758, possession from that time would have been sufficient evidence to have warranted the jury in presuming that a faculty had been granted."(i) See also *Morgan v. Curtis*,(k) where a prescription for a seat was held to be destroyed by showing that it was an open

(u) *Gibs*, 222.

(x) 2 Roll. Abr. 288; *Lonsley v. Hayward*, 1 Y. & J. 583.

(y) *Pettman v. Bridger*, 1 Phill. 324.

(z) *Morgan v. Curtis*, 3 Man. & Ry. 389.

(a) *Woolcombe v. Ouldrige*, 3 Add. 6.

(b) 2 Roll. Abr. 288.

(c) *Pettman v. Bridger*, sup.

(d) 2 Roll. Abr. 288; 1 Hagg. Consist. 322.

(e) 3 Phill. 331.

(f) 1 T. R. 431, n.

(g) *Id.* 428.

(h) 5 T. R. 296.

(i) *Per Buller, J.*, *Ib.*

(k) 3 Man. & Ry. 389.

seat upwards of fifty years ago, but now, by the Prescription Act, 2 & 3 W. 4, c. 71, a claim to a pew after twenty years is not to be defeated by shewing its commencement prior to that time, see Dig. P. iii. tit. Prescription.

490. A pew may be annexed to a house by a faculty, as well as by prescription. *(l)* Faculties for the exclusive use of pews are of different descriptions; as to a man and his family, so long as they continue inhabitants of a certain house, or so long as they continue inhabitants generally; or appropriating certain pews to certain messuages or *farm-houses, or [*411] faculties at large: the first is considered the proper form of a grant of this description, and is the most usual in modern times; *(m)* the second is objectionable, as it often entitles parishioners to the exclusive occupancy when they are no longer in a situation to be suitable occupants, whatever their ancestors may have been; *(n)* the third sort is considered as the foundation of the prescriptive claims recognised at common law. *(o)* The last kind of faculties appear to be merely void, as no faculty will be supported either at common law or in the ecclesiastical courts to the extent of entitling any person who is a non-parishioner to a seat in the body of the church. *(p)*

491. It seems now to be settled that a faculty obtained by surprise and undue connivance may be revoked, *(q)* but the superior courts are reluctant to interfere with the inferior courts in matters of faculty, *Woolcombe v. Ouldridge*, *(r)* where it was observed that faculties are generally so much within the discretion of the local judge, that there must be a considerable degree of general inconvenience to induce a reversal of his decree.

When a faculty limited to a certain period expires, the right of the parishioners revives to the pews which were the subject of the faculty. *(s)*

492. A faculty, like a prescription, may be presumed, but mere possession, though long continued, will not always be sufficient; therefore, where a pew in a chancel, claimed in right of a messuage, was shewn to have been erected on the site of old open seats in 1773, and there was no evidence of any faculty, it was held, that the judge rightly directed the jury, that the evidence of the former open state of the seats destroyed the prescription, [*412] and left it to them to say *whether upon the evidence merely of long undisturbed possession, any faculty might be presumed, and a new trial was refused. *(t)*

493. Besides the right to a pew, acquired either by a faculty or a prescription, there is another sort of right which has been termed "possessory." This, by the ecclesiastical courts, is held sufficient to maintain a suit against a mere wrong-doer, and as the fact of possession implies either the virtual or actual authority of those having power to place, the disturber must show that he has been placed there by such authority, or must justify his disturbance by shewing a paramount right, a right paramount to the ordinary himself, namely,

(l) 1 T. R. 431.

(m) Butt v. Jones, 2 Hagg. 417. *(n)* Fuller v. Lane, 2 Add. 426; S. C., 1 Phill. 237.

(o) Butt v. Jones, sup. *(p)* 2 Add. 427; 5 B. & C. 21. *(q)* Butt v. Jones, sup.

(r) 3 Add. 6. *(s)* 3 Hagg. 733. *(t)* Morgan v. Curtis, 3 Man. & Ry. 389.

*Eng. Com. Law Reps. xi. 137.

a faculty; (u) the possession will have its weight, and the ordinary will give preference to a person in possession *cæteris paribus* over a mere stranger; (u) and a possessory title is sufficient ground for resisting a faculty; (x) but this right is only co-extensive in duration with actual possession, and if this be abandoned the whole ceases. (y)

2. *Disturbance of the Right, and the Remedies.*

494. Where a pew is claimed as annexed to a house either by faculty or prescription, the courts of common law exercise jurisdiction on the ground that a disturbance of a right to a pew is a detriment to the occupation of a house to which it is annexed; (z) so, where the pew is in a chancel, the freehold of an individual, the right to it is triable at common law, (a) and it is properly triable by an action on the case; (b) so, it is agreed that the plaintiff need not shew reparation in his declaration, but he ought to prove reparation in evidence; (b) but trespass will not lie for disturbance *of a man's right to a pew, because the plaintiff has not exclusive posses- [*413] sion, the freehold being in the parson; (c) but such action can only be maintained on proof of a faculty, or by such evidence as fairly leads to the presumption of a faculty; possession merely is not sufficient to support such an action. (d)

495. In all cases of prescriptions for seats the ordinary has nothing to do with the matter, but it is solely determinable at the common law; (e) and therefore, if a suit be commenced in the spiritual court, upon the account of prescription, a prohibition will lie for the party sued, because, whether the prescription be good or not, is not in the spiritual court to judge; (f) but the spiritual courts may proceed upon libels grounded upon prescriptions, where the prescription is not denied; (g) and the defendant, if he will, may admit the prescription to be tried, as the defendant does a modus or a pension by prescription; (h) so, an action at common law will not lie for disturbing another in the possession of a pew unless the pew be annexed to a house in a parish, (i) the disturbance in that case, not concerning the freehold, is matter for ecclesiastical cognizance only; (i) so, if a man claiming title by prescription to an aisle, chancel, &c., as his freehold, or to a pew or seat in the body of the church, or in an aisle, &c., as appurtenant to a house in the parish, is disturbed therein by the ordinary, or other, by a suit in the spiritual court, he may have a prohibition, if he suggest as grounds for it, that he, or those whose estate he hath, built or time out of mind repaired the same, and therefore had the sole use of such pew. (k)

(u) *Pettman v. Bridger*, 1 Phill. 324.

(x) *Wilkinson v. Moss*, 11 Lee, 259.

(y) *Woolcombe v. Ouldridge*, 3 Add. 7.

(z) *Mainwaring v. Giles*, 5 B. & A. 362.^y

(a) *May v. Gilbert*, 2 Bulstr. 151.

(b) *Ib.* See *Wats. C. L.*, c. 39.

(c) *Stocks v. Booth*, 1 T. R. 428. See also *Noy*, 78; 1 Sid. 88.

(d) *Stocks v. Booth*, sup.

(e) *Hawkins v. Compiegne*, 3 Phill. 11.

(f) *Witcher v. Cheslow*, 1 Wils. 17.

(g) *Wats. C. L.*, c. 39.

(h) *Jacob v. Dallow*, 2 Salk. 551; S. C., 2 Ld. Raym. 755.

(i) *Mainwaring v. Giles*, 5 B. & A. 362.^z

(k) See *Corwen v. Pym*, 12 Co. 105; *Boothby v. Bailey*, Hob. 69; *Day v. Bedingfield*, *Noy*, 104; *Francis v. Ley*, Cro. Jac. 366.

[*414] *496. If a party has not a title by prescription, the ordinary has conusance of any disturbance of a man's possession, which is called "perturbation of a man's seat," and may quiet the same; (*l*) and the ecclesiastical court will admonish a wrong-doer not to disturb a person in the possession of a pew, although the latter has no well-founded title to it; (*m*) so, in a possessory action against a stranger and a wrong-doer, the plaintiff is not obliged to prove any repairs done by himself or others whose estate he hath, (*m*) for it is a rule of law that one in possession need not shew any title or consideration for such possession against a wrong-doer; but it is otherwise where one claims a pew or an aisle against the ordinary, for he has *primâ facie* the disposing of all the seats in the church; therefore, against him a title or consideration must be shewn in the declaration, and proved as to the building and repairing. (*n*)

497. Perturbation of seat is a civil proceeding, which a party may have who has been disturbed in the possession and enjoyment of his seat, whether the disturbance proceeds from the churchwardens or a mere intruder; but against the churchwardens there is another remedy afforded by the ecclesiastical court, which has been termed "a convenient remedy," namely, that of citing the churchwardens to shew cause why they have not seated certain persons suitably to their condition, which mode was adopted in *Walker v. Gunner*, (*o*) and approved of by Lord Stowell. (*o*)

[*415]

*II. Other Easements.

§ 499. Extent of the Right of Burial.

500. Right to Support from the neighbouring Land.

501. What an ancient House.
Dodd v. Holme.

502. When House not entitled to Privileges of an ancient House.
Partridge v. Scott.

503. Support from neighbouring Buildings.
Peyton v. London (Mayor, &c.)

504. Brown v. Windsor.

505. Effect of Negligence.

Walters v. Pfeil.

Dodd v. Holme.

Trower v. Chadwick.

506. Extent of the Right to Support from the neighbouring Building.

507. Custom of London.

508. Extent of the Right to Fences.

509. Extent of the Liability to fence against Cattle.

510. Right to hang Linen to dry.

511. Right to land with Nets.

512. What Easements created by License.

513. Effect of Parol Licenses.
Hewlins v. Shippam.

514. Monk v. Butler.

515. Hoskins v. Robins.

516. Rumsey v. Rawson.

517. Harrison v. Parker.

518. Fentiman v. Smith.

519. Cocker v. Cowper.

520. Bryan v. Whistler.

521. License executed not revocable.

522. Liggins v. Inge.

523. Wallis v. Harrison.

524. License not conferring a Freehold Interest.

Wood v. Lake.

525. Taylor v. Waters.

526. License extinguishing an Easement.

527. Legalizing a Nuisance.

(*l*) Jacob v. Dallow, 2 Salk. 551; S. C., 2 Ld. Raym. 755.

(*m*) Cross v. Salter, 3 T. R. 369.

(*n*) Kenrick v. Taylor, 1 Wils. 326, recognized in Cross v. Salter. See also Ashby v. Frecklinton, 3 Lev. 73.

(*o*) 1 Hagg. 417.

§ 498. Among the other rights which have been considered as easements, are a right to be buried in a particular vault; a right to support from the neighbouring land; a right to have fences maintained; a right to hang linen to dry over the land of another; and a right to land with nets on the banks of a river.

1. *Right of Burial.*

499. As a rule, every person may be buried in the churchyard of the parish where he dies, without paying anything for breaking the soil; (*p*) but a fee may be due by custom: (*q*) a custom, however, for a parishoner to bury *his deceased relations as near to their ancestors as possible is [*416] not good; (*r*) so, a *mandamus* will not lie to compel the incumbent to bury in a particular part of a churchyard, that being a matter to be left to the discretion of the incumbent; (*s*) so, no person may be buried in the church without the incumbent's consent; (*t*) but a prescription for a right of burial in a chancel, claimed as belonging to a messuage, was allowed in *Waring v. Griffiths*; (*u*) so, a burying-place may be prescribed for as belonging to a manor, and an action may be brought by the lord for disturbance of his burying there; (*x*) and the same rules are applicable to vaults as to pews, (*y*) therefore, a right to make a vault and have the sole and exclusive use, if it could be granted by a rector, would be an easement; (*y*) but it seems that a rector can make no such grant, he can only give a license each several time. (*y*)

2. *Right to Support from Land or Buildings.*

500. It is laid down in *Wilde v. Minsterley*, (*z*) "that a man who has land closely adjoining my land, cannot dig his land so near mine that mine would fall into his pit, and an action brought for such an act would lie;" and this is confirmed in *Wyatt v. Harrison*, (*a*) where it is said, "It may be true that if my land adjoins that of another, and I have not by building increased the weight upon my soil, and my neighbour digs in his land, so as to occasion mine to fall in, he may be liable to an action;" (*b*) but if A., seized in fee of land closely adjoining the land of B., erect a new house on the confines of such land, and B. afterwards dig his land so near to the foundation of A.'s house that it falls into the pit, still no action lies by A. against B., inasmuch as it was the fault of A. himself that he built his house so near the *land of B., for he cannot by his own act prevent B. from making the best use of his land that he can; (*c*) (1) and this [*417]

(*p*) *Degge*, 146; 1 *Hagg. Cons.* 208; 2 *B. & A.* 806.

(*q*) *Willes*, 536.

(*r*) *Fryer v. Johnson*, 2 *Wils.* 28.

(*s*) *Ex parte Blackmore*, 1 *B. & Ad.* 122.^a

(*t*) *Frances v. Ley*, *Cro. Jac.* 367. (*u*) 1 *Burr.* 140; *S. C.*, 2 *Keny.* 183.

(*x*) *Sir John Harvey's case*, cited in *Dawney v. Dec*, *Cro. Jac.* 606.

(*y*) *Bryan v. Whistler*, 8 *B. & C.* 293; *S. C.*, 2 *Man. & Ryl.* 318.

(*z*) 2 *Roll. Abr.* 564. (*a*) 3 *B. & Ad.* 874. (*b*) *Per Tenterden*, *C. J.*, *Ib.*

(*c*) *Wilde v. Minsterley*, 2 *Roll. Abr.* 564.

(1) The same point is decided in *Lasala v. Holbrook*, 4 *Paige*, 169, in the case of a

^a*Eng. Com. Law Reps.* xx. 356. ^b*Id.* xv. 219. ^c*Id.* xxiii. 205.

principle is recognised in *Wyatt v. Harrison*,^(d) which was a similar case, and it was said, "Whatever the law might be, if the damage complained of were in respect of an ancient messuage possessed by the plaintiff at the extremity of his own land, which circumstance of antiquity might imply the consent of the adjoining proprietor, at a former time, to the erection of a building in that situation, it is enough to say in this case, that the building is not alleged to be ancient, but may, as far as appears from the declaration, have been recently erected, and if so, then, according to the authorities, the plaintiff is not entitled to recover, for if I have laid an additional weight upon my land, it does not follow that he is to be deprived of the right of digging his own ground, because mine will then become incapable of supporting the artificial weight which I have laid upon it; and this is consistent with 2 Roll. Abr.^(e) The judgment will, therefore, be for the defendant."^(f)

501. If a house has stood twenty years, it is now considered to have acquired the rights of an ancient house, whatever they may be, *Dodd v. Holme*,^(g) where it was said, "Suppose the house to have been substantially built, to have stood thirty or forty years, and to have been kept in proper repair, do you say, that, if the defendant, by excavating his adjacent ground, let down that house, though without actual negligence on his part, action would not lie against him?"^(h)(1)

502. But, a house will not have the privilege of support as an ancient house, if it appear to have been built upon ground previously excavated; therefore, in **Partridge v. Scott*,⁽ⁱ⁾ where a party built a house on [*418] his own land which had been previously excavated to its extremity for mining purposes, he did not acquire a right to support from the adjoining land of another, at least not until twenty years had elapsed since the house first stood on the excavated land and was in part supported by the adjoining land, so that a grant by the owner of the adjoining land of such right to support might be inferred; and in this case it was said, "Rights of this sort, if they can be established at all, must, we think, have their origin in grant. If a man builds his house at the extremity of his land, he does not thereby acquire any right of easement, for support or otherwise, over the land of his neighbour. He has no right to load his own soil so as to make it require the support of that of his neighbour, unless he has some grant to

^(d) 3 B. & Ad. 874.¹

^(g) 1 Ad. & Ell. 493.^e

⁽ⁱ⁾ 3 M. & W. 220.

^(e) 564.

^(f) Per Id. Tenterden, Id.

^(h) Per Littledale, J. Ib.

building erected more than thirty-eight years. So in case of an alteration of the level of a street, *Callender v. Marsh*, 1 Pick. 434. *Thurston v. Hancock*, 12 Mass. 220, though in this case the doctrine of prescription from user for twenty years though not adversely, is recognized. *Panton v. Holland*, 17 Johns. 92, is to the same effect. In *Richart v. Scott*, 7 W. 460, it was said no prescriptive right could be acquired where there had been no adverse user of another's property, however long it might be continued; hence the rule as above stated in *Lasala v. Holbrook* is adopted.

(1) See preceding note.

that effect; *Wyatt v. Harrison*(j) is precisely in point as to this part of the case; and we entirely agree with the opinion there pronounced.”(k)

“In this case, if the land, on which the plaintiff’s house was built, had not been previously excavated, the defendants might, without injury to the plaintiff, have worked their coal to the extremity of their own land, without even leaving a rib of ten yards, as they have done. And if the plaintiff had not built his house on excavated ground, the mere sinking of the ground itself would have been without injury. He has, therefore, by building on ground insufficiently supported, caused the injury to himself, without any fault on the part of the defendants, unless at the time, by some grant, he was entitled to additional support from the land of the defendants. There are no circumstances in the case from which we can infer any such grant as to the new house, because it has not existed twenty years; nor as to the old house, because, though erected more than twenty years, it does not appear that the coal under it may not have been excavated within twenty years; and no grant can at all events be inferred, nor could the right to any easement *became absolute even under Lord Tenterden’s Act, (the Prescription Act, 2 & 3 W. 4, c. 71, see Dig. P. iii. tit. Prescription,) [*419] until after the lapse of at least twenty years from the time when the house first stood on excavated ground, and was supported in part by the defendants’ land.”(l)

“If the law stood as it did before Lord Tenterden’s Act, (s. 2, sup.), we should say that such a grant ought not to be inferred from any lapse of time short of twenty years, after the defendants might have been or were fully aware of the facts. And even since that act, the lapse of time, under these peculiar circumstances, would probably make no material difference; for the proper construction of that act requires, that the easement should have been enjoyed for twenty years under a claim of right. Here neither party was acquainted with the fact that the easement was used at all; for neither party knew of the excavation below the house. We should probably have been of opinion, that there was no user of the easement under a claim of right, and that Lord Tenterden’s Act, therefore, would not apply to a case like this.”

“We think, upon the whole, that the defendants are entitled to our judgment.”(l)

503. This principle appears also to be extended to the right to support from buildings, as well as from land; therefore, in case by a reversioner of a house in Cheapside against the owner of the adjoining house, for pulling it down without shoring up the plaintiff’s house, in consequence whereof it was impaired and in part fell down, it was held, first, that, upon this declaration, the plaintiff could not recover on the ground of the defendant’s not having given notice that he was about to pull down his house, that not being alleged as a cause of the injury; secondly, that, *as the plaintiff had not alleged or proved any right to have his house supported [*420] by the defendant’s, he was bound to protect himself by shoring, and could not complain that the defendant had neglected to do it.(m)

(j) 3 B. & Ad. 874.^f

(k) Per Alderson, B., *Ib.* (l) Per Alderson, B., *Wyatt v. Harrison*, 3 B. & Ad. 874.^g

(m) *Peyton v. London (Mayor, &c.)*, 9 B. & C. 725.^h

^fEng. Com. Law Reps. xxiii. 205. ^g*Id.* ^h*Id.* xvii. 483.

504. Where an easement of this kind has been given, the owner of the premises can only use his rights subject to such easement; if, therefore, a party grant an easement, and then act so that it cannot be enjoyed, an action lies against him, as where a plaintiff had rested his house upon a pine-end belonging to the defendant, and this had been originally done by permission of the owner of the wall, it was held, that where the defendant, by excavating near his pine-end wall, caused it to sink, so that the plaintiff's house which rested against it was injured, an action against him was supported.⁽ⁿ⁾

505. It appears that, where there is no claim of an easement, the owner of premises adjoining those pulled down must shore up his own in the 'inside, and do every thing proper to be done upon them for their preservation,^(o) but still the omission so to do will not excuse negligence on the part of those taking down the adjoining house,^(o) and although the foundation of the plaintiff's house was proved to be rotten; yet in *Dodd v. Holme*^(p) it is said, "A man has no right to accelerate the fall;"^(q) and in *Trower v. Chadwick*,^(r) it is laid down, that "although a man may have no right of support from the building of his neighbour, yet if the latter choose to withdraw such support, he must take reasonable and proper care in so doing, and for negligence and unskilfulness he is liable to an action."

[*421] *506. Where a party is entitled to the easement of support from his neighbour's building, it will be an invasion of that right if he does any injury to his neighbour's building in pulling down his own, although done with ever so much care, as was admitted in *Trower v. Chadwick*; ^(s) so, in *Harris v. Ryding*,^(t) where there had been a grant of the minerals under the land, and the defendant removed them in such a manner as to cause the surface of the earth to fall in, this was held to be a violation of the easement of support which the plaintiff was entitled to, being the entire removal of the inferior strata, which, however done, was actionable.

507. Nearly allied to this easement of support from buildings is also the custom of London, by which a man may for the repair of his house, set his poles and ladders upon the soil or house of another adjoining;^(u) but he cannot break the soil or house;^(u) so, the builder of a house in London on a new foundation is not entitled to erect half of his flank or side wall on his neighbour's vacant ground.^(x)

3. *Right to have Fences maintained.*

508. As a rule, the proprietor of every land is bound, by means of fences or otherwise, to prevent his cattle from trespassing on the land of his neigh-

(n) *Brown v. Windsor*, 1 Cr. & J. 20.

(o) *Walters v. Pfeil*, Mood. & Malk. 364.ⁱ

(p) 1 Ad. & Ell. 493;^k S. C., 3 Nev. & Man. 739.

(q) Per Ld. Denman, C. J.

(r) 3 Bing. N. C. 334;^l S. C., 3 Scott, 699.

(s) 3 Bing. N. C. 334;^o S. C., 3 Scott, 699.

(t) Cited Gale and Whatley, *Law of Easements*, 265.

(u) Priv. Lond. 59; Com. Dig. tit. London, (N. 5.)

(x) 2 Bl. 959.

ⁱEng. Com. Law Reps. xxii. 334. ^kId. xxviii. 128. ^lId. xxxii. 142. ^od. xxxii. 142.

bour, "But he is under no legal obligation to keep up fences between adjoining closes of which he is owner; and even where adjoining lands which had once belonged to different persons, one of whom was bound to repair the fences between the two, afterwards became the property of the same person, the pre-existing obligation to repair the fences was destroyed by the unity of ownership. And where the person, who has ^{so} become [*422] the owner of the entirety, afterwards parts with one of the two closes, the obligation to repair the fences will not revive unless express words be introduced into the deed of conveyance for that purpose." (y) An obligation may, however, arise by a deed of agreement for one party to repair fences for the benefit of the owner of adjoining lands; and in *Boyle v. Tamlin*, (z) it is said, "If there was proof of any such stipulation, I think it would support the allegation, that the defendant by reason of his possession was bound to repair. Such a right to have fences repaired by the owner of adjoining lands is in the nature of a grant of a distinct easement affecting the land of the grantor." (a)

509. This liability is, however, confined to the cattle of his neighbour, or such as are rightfully on the adjoining land, and does not extend to cattle which have no right to be there, *Dovaston v. Payne*, (b) where it is said, "If the cattle of one man escape into the land of another, it is not any excuse that the fences were out of repair, if the cattle were trespassers on the close from whence they came;" (c) so, *Anon.*, 3 Wils. 126, where it is said, "If a man turn his cattle into Blackacre where he has no right, and they escape and stray into my field, for want of fences, he cannot excuse or justify himself for his cattle trespassing in my field." (1)

4. *Right to hang Linen to dry over the soil of another, &c.*

510. A liberty to hang linen to dry on lines passing over the soil of another is an easement, which was recognized in *Drewell v. Towler*; (d) but, as the plaintiff claimed a liberty for him and the other tenants to hang linen as often as they had occasion so to do, at their free will and pleasure, and ^{the} jury found that they had the liberty to dry the linen of their [*423] own families only, he was nonsuited.

5. *Right to land with Nets.*

511. The user of the banks of a river for more than twenty years by fishermen, who have occasionally sloped and levelled the same, is evidence of a grant by the owner of the soil, although both the fishery and the land-

(y) Per Bayley, J., *Boyle v. Tamlin*, 6 B. & C. 337.^o (z) Sup.

(a) Per Bayley, J., *Boyle v. Tamlin*, sup. (b) 2 H. Bl. 527.

(c) Per Heath, J., *ib.*

(d) 3 B. & Ad. 735.^e

(1) Even where there are statutes requiring partition fences, the same rules are applied. *Rust v. Low*, 6 Mass. 90. *Stackpole v. Healy*, 16 id. 23. *Little v. Lathrope*, 5 Greenl. 356. *Avery v. Maxwell*, 4 New Hamp. 36. *Wells v. Howell*, 19 Johns. 145. *Holladay v. Marsh*, 3 Wend. 145. *Adams v. McKenney*, Addis. 258.

^oEng. Com. Law Reps. xiii. 191. ^eId. xxiii. 172.

ing-place belonged to the same person, and there was no evidence to shew, that the former owner, or those who claimed under him, knew that the shore had been so used.(e)

512. The origin of every easement is referable to some agreement, express or implied. The easements of the more important kind, as commons, ways, and water, are created either by grant or by prescription which supposes a grant, and uninterrupted possession or enjoyment has long been held to be sufficient evidence to be left to a jury to presume a grant;(f) but, as to the minor rights above-mentioned, they have been created for the most part by license, and questions have arisen where the license was by parol, whether any right of this kind could be thereby created, and it seems to be now settled, that easements, like all other incorporeal hereditaments, must be under seal, therefore, a license by the lord of a manor to build a cottage on the waste gave no estate to the grantee, *R. v. Harrow*, (*Inhab.*)(g) where it is said, "A license is not a grant, but may be recalled immediately, and so might this license the day after it was granted;"(h) and it is laid down, that a license or liberty (amongst other things) cannot be created and annexed to an estate of inheritance without deed.(i)

[*424] *513. On this principle, where, for a valuable consideration, the defendant and his landlord granted to A., his heirs and assigns, license and authority to make at his own expense a drain in his, the defendant's, land, and that A., his heirs and assigns, should have the foul water collected on his premises to run into such drain, it was held, that, as the right claimed was a freehold right, assuming that it was an easement only upon the land of another, and not an interest in the land, yet it could not be created without a deed,(k) "for although a parol license might be an excuse for a trespass till such license were countermanded, a right and title to have a passage for the water is a freehold, which requires a deed to create it."(l)(1)

514. And the same had been decided by prior authorities in reference to different easements, as *Monk v. Butler*,(m) where the plaintiff in replevin answered an avowry for *damage feasant* by a plea of license from a commoner who had right for twenty beasts; it was objected, that, if the commoner could license, he could not do so without deed, and of that opinion was the whole Court.

(e) *Gray v. Bond*, 2 B. & B. 667.

(f) 2 Wms. Saund. 175, a.

(g) 4 M. & S. 565.

(h) Per Ld. Ellenborough, C. B., Ib.

(i) Sheph. Touchst. p. 231; 1 Inst. 9; *Termes de Ley*, voc. Easement.

(k) *Hewlins v. Shippam*, 5 B. & C. 221; 7 S. C. & R. 783

(l) Per Bayley J., 5 B. & C. 222.

(m) *Cro. Jar.* 574; recognized in *Hewlins v. Shippam*, sup.

(1) *Hays v. Richardson*, 1 Gill & Johns. 366. *Cook v. Stearns*, 1 Mass. 533, 534. *Thompson v. Gregory*, 4 Johns. 81. Subject to the equitable right acquired as an executed contract. *Lefèvre v. Lefèvre*, 4 S. & R. 241. *Rerick v. Kern*, 14 S. & R. 271. *Ricker v. Kelly*, 1 Greenl. 119, 120. *Davenport v. Mason*, 15 Mass. 92.

*Eng. Com. Law Reps. vi. 308. Id. xi. 207.

515. So, in *Hoskins v. Robins*,⁽ⁿ⁾ an objection was taken to such a license on account of its not being stated to be by deed, and although the objection was overruled on the ground, that after verdict it must be taken that the license was by deed, yet the Court were unanimous in thinking that such a license could not be granted without deed.

516. A similar objection to such a license, after verdict on a collateral issue, was previously overruled, because the *license was only to take the profit *unicâ vice*, and because no estate passed by it.^(o) [*425]

517. So, in *Harrison v. Parker*,^(p) where liberty and license, power and authority, were granted to the plaintiff and his heirs to build a bridge across a river, from plaintiff's close, to the close of A., and liberty and license to plaintiff to lay the foundation of one end on A.'s close, the grant was by deed.

518. So, in *Fentiman v. Smith*, where the plaintiff claimed to have a passage for water, by a tunnel, over defendant's land, Lord Ellenborough lays it down distinctly, "The title to have the water flowing in the tunnel over defendant's land could not pass by parol license without deed, and the plaintiff could not be entitled to it as stated in the declaration, by reason of his possession of the mill, but he had it by license of the defendant or by contract with him; and if by license, it was revocable at any time."^(q)

519. In a case subsequent to *Hewlins v. Shippam*,^(r) where the previous authorities are collected, the plaintiff sued for the obstruction of a drain which had been originally constructed at the plaintiff's expense, on the defendant's land, by his consent verbally given. After it had been enjoyed for some time, the defendant obstructed the channel, so that the water was prevented running as before; and the Court held that the plaintiff was clearly not entitled to recover. "The case of *Hewlins v. Shippam*,^(r) is decisive to shew that an easement like this cannot be acquired except by deed, nor has the plaintiff acquired any other title to the water; the mere entry into the close of another, and cutting *a drain there, cannot confer a title."^(s) [*426] A distinction was there taken in argument which had in some cases been admitted between an agreement executed and one executory, but the argument did not prevail, see *infra*, § 521.

520. In *Bryan v. Whistler*,^(t) the right to be buried in a particular vault was held to be an easement which could be created by deed only; and therefore a parol license was held to confer no right, though the plaintiff had paid a valuable consideration on the faith of the agreement.

(n) 2 Vent. 123; also cited in *Hewlins v. Shippam*, *sup.*

(o) *Rumsey v. Rawson*, 1 Vent. 18; cited in *Hewlins v. Shippam*, 5 B. & C. 221;^b S. C., 7 D. & R. 783.

(p) 6 East, 154; recognized in *Hewlins v. Shippam*, *sup.*

(q) 4 East, 109; recognized in *Hewlins v. Shippam*, 5 B. & C. 221.^b

(r) *Sup.* (s) *Per Curiam*, *Cocker v. Cowper*, 1 Cr., M. & R. 418.

(t) 8 B. & C. 298;^c S. C., 2 Man. & Ry. 318.

^bEng. Law Com. Reps. xi. 207. ^cId. xv. 219.

So, in an earlier case, a right to carry on a noisy trade was held not to be gained by a parol license.(x)

But it is not settled whether a parol license will confer an easement of light and air.(y)

521. The rule that a parol license is revocable admits of exceptions upon different grounds, as, first, where the license has been executed,(1) in distinction from cases where it is executory only; in the next place, where the license does not confer a freehold interest; and thirdly, where it operates to extinguish an easement. The principal case of the first kind is *Winter v. Brockwell*,(z) where a parol license to put a skylight over the defendant's area (which impeded the light and air from coming to the plaintiff's dwelling through a window) could not be recalled at pleasure after it had been executed at the defendant's expense, at least not without tendering the expenses he had been put to, and therefore no action lay as for a private nuisance in stopping the light and air, &c., and communicating a stench from the defendant's premises to the plaintiff's house by means of such skylight. But this case is said to be clearly distinguishable from the present (*Hewlins v. Shippam*)(a). All that the defendant there did, he did upon his [*427] own land. He claimed no right or easement upon the plaintiff's. The plaintiff claimed a right and easement against him, viz. the privilege of light and air through a parlour window, and a free passage for the smells of an adjoining house through defendant's area; and the only point there decided was, that, as the plaintiff had consented to the obstruction of such his easement, and had allowed the defendant to incur expense in making such obstruction, he could not retract that consent without reimbursing the defendant that expense. But that was not the case of the grant of an easement to be exercised upon the grantor's land, but a permission to the grantee to use his own land in a way in which, but for an easement of the plaintiff's, such grantee would have had a clear right to use it.(b)''

522. In *Liggins v. Inge*,(c) which was the case of a parol license to erect a weir, the Court held it not to be revocable, on the ground that it had been executed. "There is a clear distinction between a license to do something which in its own nature seems intended to be permanent, and by which expense is incurred, and a license to do acts which consist in repetition, as to walk in a park, to use a carriage-way, to fish in the waters of another, or the like; which license, if countermanded, the party is but in the same situation as he was before it was granted; but this is a license to construct a work which is attended with expense to the party using the license, so that, after the same is countermanded, the party to whom it was granted may sustain a heavy loss, and it was the fault of the person himself if he meant

(x) *Bradley v. Gill*, 1 Lutw. 70.

(y) *Blanchard v. Bridges*, 4 Ad. & Ell. 195.^d

(a) 5 B. & C. 221; S. C., 7 D. & R. 783.

(c) 7 Bing. 693.^f

(z) 8 East, 309.

(b) Per Bayley, J., *Ib.*

(1) Ante, § 513, note 1.

^dEng. Com. Law Reps. xxxi. 46. ^eId. xi. 207. ^fId. xx. 287.

to reserve the power of revoking such license after it was carried into effect, that he did not expressly reserve that right.(d)"

523. In *Wallis v. Harrison*,(e) the same distinction between *agreements executed and executory is recognized, therefore, a parol [*428] license from A. to B. to enjoy an easement, as to make a railway over A.'s land, was held countermandable at any time while it was executory; and if A. conveyed the land to another, the license was determined at once, without notice to B. of the transfer, and B. was liable in trespass if he afterwards entered upon the land.

524. In the next place, a license not conferring a freehold interest in land has been held not revocable, as in *Wood v. Lake*,(f) which was a license to stack coals on the close of another for seven years, and it was there held, that it could not be revoked at the end of three years; so in *Webb v. Paternoster*,(g) which was a license to lay a stack of hay on the land of Sir W. Plummer for a reasonable time, afterwards Sir W. Plummer leased the land, and the lessee turned in his cattle and ate the hay, for which an action was brought, and the whole Court held that such license was good, and could not be countermanded within a reasonable time, but that more than a reasonable time had elapsed, (half a year,) and therefore the license was at an end.

525. So, in *Taylor v. Waters*,(h) which was an action against the door-keeper of the Opera-house, for denying admission to the plaintiff, who was the holder of a silver ticket purporting to give him an entrance into that theatre for twenty-one years, it was objected that the right claimed was an interest in land, and being for more than three years could not pass without a writing signed by the party, or his agent authorised in writing, and moreover, that being an incorporeal hereditament it could only pass by deed; the Court, however, held, that it was not such an interest in land as to require a deed, being only a license irrevocable *to permit the plaintiff to enjoy certain privileges thereon, and did not require to be in writing by the [*429] Statute of Frauds, though it extended beyond the term of three years; and after citing *Wood v. Lake*,(i) *Webb v. Paternoster*,(j) and *Winter v. Brockwell*,(k) it was added, "These cases abundantly prove that a license to enjoy a beneficial interest in land may be granted without deed.(l)" So, in *Hewlins v. Shippam*,(m) it is said, "*Webb v. Paternoster*, *Wood v. Lake*, and *Taylor v. Waters*,(n) were not cases of freehold interest, and in none of them was the objection taken that the right lay in grant, and therefore could not pass without deed. These, therefore cannot be considered as authorities upon the point; and on these grounds therefore that the right claimed by the declarations (in this case) is a freehold right, and that if the thing claimed is to be considered as an easement, and not an interest in the land, such a right

(d) Per Tindal, C. J., *Ib.*

(e) 4 M. & W. 538.

(f) Say, 3.

(g) Palm. 71; S. C., Poph. 151; S. C., 2 Roll. Rep. 152.

(h) 7 Taunt. 384.^f

(i) Say, 3.

(j) Palm. 71; S. C., Poph. 151; S. C., 2 Roll. Rep. 152.

(k) 8 East, 309.

(l) Per Gibbs, C. J., *Taylor v. Waters*, 7 Taunt. 384.^s (m) 5 B. & C. 221.^b (n) Sup.

^fEng. Com. Law Reps. ii. 140. ^s*Id.* ii. 140. ^b*Id.* xi. 207.

cannot be created without deed, we are of opinion that the nonsuit was right, and that the rule ought to be discharged ;(o)" but see *Williams v. Morris.*(p)

526. When a license operates to extinguish an easement, it has also been held not to be revocable, as where permission was given to a man to erect a weir on his own land, which was incompatible with the continuance of the easement of water over it, to which the licensor was entitled ;(q) for "there is nothing unreasonable in holding that a right which is gained by occupancy may be lost by abandonment."(r) It is here assumed that a right to water is gained by mere occupancy, but this point has since been much discussed as to the extent to which it ought to be carried, see ante, § 417.

*527. On the subject of easements generally, it remains only to [*430] observe, that many acts done upon or in respect of the land of another, which, as being injurious, would be actionable nuisances, may, after the requisite period of enjoyment, become lawful, and the party acquire a prescriptive title to them as easements ; thus a right not to have water discharged upon one's land is an incident of property, and the infringement of that right is actionable, but a right to let water off, even in an impure state, may be acquired, like any other easement, by user ;(s) so, a right to wholesome untainted air is at common law a right appurtenant to a house, and the communicating noisome smells is a nuisance, unless the business which creates the nuisance has been carried on there for so great a length of time, that the law will presume a grant from the neighbours in favour of the party who causes it ;(t)(1) so, user may justify the exercise of a noisy trade ;(u) but nothing less than twenty years' user will suffice to legalize a nuisance, and, therefore, where a defendant alleged a user of only three years, judgment was given against him.(l)

528. But whether, if the party complaining come to the nuisance, he have any right of action for the injury sustained thereby is not settled. It has been said, "If my neighbour makes a tan-yard so as to annoy and render less salubrious the air of my house or garden, the law will furnish me with a remedy ; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and may continue ;"(v) and this doctrine seems to derive some authority from *Moore v. Browne* ;(w) *Leeds v. Shakesby* ;(x) *Tenant v. Goldwin* ;(y) *Lawrence v. Obee* ;(z) sed [*431] *contra*, 4 Ass., pl. 3 ; F. N. B. 124, H. ; *Westbourne v. Mor-*
daunt ;(a) *Beswick v. Cunden* ;(b) *Penruddock's case* ;(c) *Some v. Barwish* ;(d) see also *Roswell v. Prior.*(e)

(o) Per Bayley, J., *Hewlins v. Shippam*, sup.

(p) 8 M. & W. 488.

(q) *Liggins v. Inge*, 7 Bing. 693.ⁱ

(r) Per Tindal, C. J., *Id.*

(s) *Wright v. Williams*, 1 M. & W. 77.

(t) *Bliss v. Hall*, 6 Scott, 500.

(u) *Elliotson v. Feelham*, 2 Bing. N. C., 134 ; S. C., 2 Scott, 174.

(w) Dy. 319 b, pl. 17.

(x) Cro. El. 351.

(y) 2 Ld. Raym. 1089 ; S. C., 1 Salk. 360.

(z) 3 Campb. 514.

(a) Cro. El. 191.

(b) *Id.* 402.

(c) 5 Co. 101.

(d) Cro. Jac. 231.

(e) 12 Mod. 635 ; *Gale and Whatley, Law of Easements*, 277 et seq.

(1) The right of the public is not thus affected. *Commonwealth v. Miltenberger*, 7 W. 450.

ⁱEng. Com. Law Reps. xx. 287.

ⁱId. xxix. 283.

SECTION XI.

OFFICES.

§ 529. The subject of offices may be considered.

1. As to their nature and several kinds.
2. How created.
3. How granted.
4. Who may hold offices.
5. Execution of an office.
6. What estates may be had in an office.
7. How forfeited or lost.
8. Disturbance of an office.

I. Nature of an Office, and the different Kinds.

§ 530. Definition of an Office.
531. Different Kinds of Offices.
Civil and Military.

531. Public and Private.
532. Ancient and Modern Offices.
533. Judicial and Ministerial Offices.

§ 530. An office is a right to exercise a private or public employment, and to take the fees and emoluments belonging thereto.

Offices being annexed in many instances to land and holden by tenure, they are ranked among incorporeal hereditaments; (*f*) thus the office of High Steward was *originally annexed to the manor of Hinckley, [*432] in Leicestershire, and so of many others. (*g*)

531. Offices are distinguished according to the nature of their respective trusts into civil and military; (*h*) and again they are divided into public and private, not so much from the extent of the authority, as from the nature of the duty, *R. v. Burnell*, (*i*) where it was a question whether a censor of the College of Physicians was such an officer as ought to take the oaths under the 25 C. 2, c. 2, a public officer being one whose duty concerned the revenue or the peace of the realm, and a private officer, one whose duty respected the concerns of individuals, of which kind it was contended that the censorship of the college ought to be reckoned. (*i*)

So, after much discussion a *mandamus* was granted to restore an attorney of the court of the city of Canterbury, who had been removed by the mayor, on the ground that the office of attorney is a public office which concerns the administration of justice. (*j*)

532. Offices are also distinguished, in respect of their antiquity, into ancient and modern, or those of new creation. And herein it is observable that constant usage hath not only sanctified the first establishment of such

(*f*) 2 Comm. 36.

(*g*) Coll. Claims of the Peerage, 185.

(*h*) 2 Comm. 36.

(*i*) Carth. 479; S. C., nom. *R. v. Burrell*, 5 Mod. 432.

(*j*) Hurst's case, 1 Lev. 75; S. C., 1 Sid. 94, 152; S. C., 1 Keb. 349.

offices as have existed time out of mind, but also hath prescribed and settled the manner in which they have and are to exist, in what manner to be exercised, and how to be disposed of, &c. ;(*k*) and a usage short of what may be legally set up by prescription will be sufficient for this purpose, "for new usages and new customs grow up, and by continuance get firm root in a time much short of legal prescription."(*l*)

[*433] *No officer that is constituted by Act of Parliament hath more authority than the Act that creates him, or some subsequent Act of Parliament doth give him, for he cannot prescribe as an officer at common law may do.(*m*)

533. Offices are again distinguished into judicial and ministerial only; the first, relating to the administration of justice or the performance of duties that require deliberation and judgment, ought to be filled by persons of sufficient capacity and property, who must personally execute the office or trust reposed in them.(*n*) But with respect to ministerial offices, they may be executed by persons physically capable of performing the duty required, as infants, &c.(*o*)

By the ancient common law, officers ought to be "honest men, legal and sage, *qui melius sciant et possint officio illo intendere*," it being the policy of prudent antiquity (says my Lord Coke) that officers should ever give grace to the place, and not the place to the officer.(*p*) As to the statutory provisions respecting particular offices, and the oaths of office, &c., see Dig. P. i. tit Office.

II. How created.

§ 534. Created by the Crown.

| § 535. To hold Courts of Equity not grantable.

§ 534. The queen being the fountain of all power and authority, all offices must have been originally created by the Crown ;(*q*) but there are many offices which have existed time out of mind, and are therefore said [*434] to be derived *from immemorial usage ;(*r*) but, since the 34 E. 1, the queen cannot erect a new office with new fees, for that would be a tallage upon the subject, which cannot be done without consent of Parliament ;(*s*) so, generally, no new office can be erected for the benefit of a private man except by Parliament, for officers are chosen by law or prescription, and the law or custom is changed only by Parliament, (*t*) therefore, an office granted by letters-patent for the sole making of bills, informations, and letters missive in the council of York, was held unreasonable and

(*k*) Bac. Abr. tit. Offices (B).

(*m*) 4 Inst. 267.

(*o*) Young v. Fowler, Cro. Car. 555.

(*q*) Com. Dig. tit. Office; Bac. Abr. tit. Office ;(B.) 2 Comm. 36.

(*r*) Dy. 176; Plow. 381; 2 Inst. 425, 540; 2 Roll. Abr. 152; 1 Roll. Rep. 206; Show. 219.

(*t*) Chute's case, 12 Co. 116.

(*l*) Anst. 624.

(*n*) Reynell's case, 9 Co. 97; W. Jo. 109; Dav. 55.

(*p*) 2 Inst. 32. 456.

(*s*) 2 Comm. 36; 2 Inst. 540.

void;(u) so, no new powers or privileges can be annexed to any office already in being, but they must be executed according to the rules prescribed and established by law, therefore, although the queen may grant the office of sheriff to hold during pleasure, yet she cannot abridge his authority while in office;(v) and it has been held, that, in the constitution of a new office, it is not necessary that an annual or casual fee should be annexed to such office.(x)

535. The queen, it seems, cannot grant to any person to hold a court of equity, although she may grant *tenere placita*, for the dispensation of equity is a special trust, not to be committed to any except her Chancellor.(y) It is said, however, that courts of equity may be holden by prescription,(z) but this has been disputed, see Bac. Abr. tit. Office, (L.)

It is also said, that counties palatine, to which courts of equity have been considered incident, may be created by the king alone without the aid of Parliament, but the weight of authority appears to be against this position.

*III. Grant of an Office.

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| <p>§ 536. What grantable in the ancient Form.
 537. Grantable by the Queen Dowager or Queen Consort.
 538. By the principal Officer.
 539. Appointments by the Judges.
 540. Appointments by Ecclesiastical Persons.
 541. Since the 1 El. c. 19.
 542. Such Grants to be made as they were anciently.
 543. May be made for two or three Lives.</p> | <p>§ 544. Grants in Reversion, when good.
 545. Cannot be granted separately, when.
 546. Assignment of Offices.
 547. Offices of Inheritance.
 548. Offices for Life.
 549. Cases of Life Estates.
 550. Stewardship of a Manor Court.
 551. Grants for Years.
 552. Grants at Will.
 553. When not grantable in Reversion.</p> |
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The grant of an office comprehends—

1. The form of the grant.
2. By whom grantable.
3. For what period grantable.

1. Form of the Grant.

§ 536. Ancient offices cannot be granted in other manner or form than is usual, unless the form be altered by Parliament, as creating by writ, where before it was created by statute,(a) or for life, where always before it was granted at will only;(b) so, the grant of an office *unâ cum fœdis pertinent'*, does not grant any fees if it be not an office by prescription;(c) so, grant of an office to a bishop for life, is not a grant to his successors, for he takes the office in his natural, not his political capacity, and therefore the grant over

(u) Mounson v. Lyster, W. Jo. 231.

(v) Mitton's case, 4 Co. 33; see also 2 Inst. 540; 4 Inst. 200; Moor, 808; 2 Sid. 141; Mounson v. Lyster, sup.

(a) 4 Inst. 75.

(x) Moor, 809.

(b) Id. 87.

(y) Hob. 63.

(z) W. Jo. 281.

(z) 4 Inst. 87.

to his successors is void.(d) In the grant of the mastership of an hospital, words of nomination only are sufficient, for he shall be in by the original constitution upon the foundation.(e)

[*436]

*2. *By whom Grants of Office may be made.*

537. Although the nomination of all offices was originally in the Crown, yet there may be a power of granting in a queen dowager, or queen consort, or other subject; and as between a queen dowager and a queen consort it is laid down in *Atkins v. Montague*,(f) "That though here the question is touching the interest of a queen dowager in the patronage, when there is no queen consort, yet it seemed to him that if there be a queen dowager and a queen consort both at the time of the voidance of the hospital, the queen dowager shall present. If the dowager's grant be good when there is a queen consort, it is much more so when there is none."(g)

538. Where one office is incident to another, such incident office is regularly grantable by him who hath the principal office; thus, the office of county clerk being incident to the office of sheriff,(h) and chamberlain of the Queen's Bench Prison (now the Queen's Prison, 5 & 6 V. c. 22, see Dig. P. iii. tit. Prisons) incident to the office of marshal,(i) and exigenter of the counties incident to the office of Chief Justice of the Common Pleas,(k) neither of these offices can be granted by any other than the principal; therefore, a grant of the office of marshal, with a reservation of the office of chamberlain, was held void;(l) so, the grant of the office of exigenter by the king, even during a vacancy of the chief justiceship, was held void, and by reason of prescription and usage.(m)

539. So, the judges of the courts have a right to appoint their own officers, as well by the common law as by statute, *(13 E. 1, c. 30, [*437] 1 W. & M. c. 21); therefore, it became incident to the office of Lord Keeper to appoint the *custos rotulorum*, and to the office of *custos* the appointment of the clerk of the peace became incident;(n) and so the judges of the courts generally have the appointment of their own officers, it having been thought fit that they should have the power of appointing those in whom they can confide.(o)

540. Bishops, and other ecclesiastical persons, may also grant offices, not only during their lives, but also in many cases so as to bind the successor, as where the office is ancient and of necessity, and cannot be exercised by the bishop in person, it may be granted so as to bind the successor,(p) with the accustomed fees for exercising it;(p) and it has been said that where

(d) Moor, 809.

(f) Ca. in Chan. 215.

(i) 1 Leon. 320.

(b) Snow v. Firebrass, 2 Salk. 439.

(n) Harcourt v. Fox, 4 Mod. 173.

(p) Bishop of Sarum's case, 10 Co. 58.

(e) *Atkins v. Montague*, Ca. in Chan. 215.

(g) Per Hale, C. J., Ib.

(h) *Mitton's case*, 4 Co. 32.

(k) Dy. 175 a., pl. 25; And. 152.

(m) *Skrogges v. Coleshil*, Dy. 175 a.

(o) 2 Inst. 425; see also Dig. P. i. iii. tit. Office.

the office is ancient, the grant of such office and fee, with the addition of a new fee, is good ;(*p*) but this point is disputed.(*q*)

So, although it be a new office, yet if it be necessary, and the fee reasonable, it will be binding on the successor.(*p*)

541. Notwithstanding the stress which is laid in most of the old cases (see Bac. Abr. tit. Offices, (D)) on the necessity of the office, to make it binding on the successor, this is now held to be immaterial, *Trelawny v. Winton* (Bishop) (*r*), where it was held, not only an office and fee which existed prior to the statute of Elizabeth (1 El. c. 19) are not within the restraint of that statute, but that the necessity and utility of an office is not more material since than it was before the statute ;(*r*) but the ancient mode of granting the office must be pursued, and therefore if an office have been anciently granted to one, a grant to two for their lives will not bind the successor ;(*s*) so, if the office have been anciently granted to one with an ancient fee, and *afterwards a grant be made to another in reversion, this will not be binding on the successor, because this might [*438] tend to the tying up the successor's hands in a most unreasonable manner.(*t*)

542. But as ancient offices are not within the 32 H. 8, c. 28, nor the 1 El. c. 19, and the 13 El. c. 10, (see Dig. P. iii. tit. Leases (Ecclesiastical), but remain entirely as at common law, they must, to bind the successors, be confirmed in the same manner as all other grants or alienations by ecclesiastical persons must then have been ;(*t*) and although a bishopric, deanery, or the like, were founded but of late times, yet the grant of such offices as are necessary, and cannot be exercised by the bishop or dean in person, may be allowed, together with a reasonable fee for the exercise thereof, (the reasonableness whereof the Court is to judge ;) for such grants cannot be said to tend to the impoverishment of the successor, but rather for his benefit, by providing officers fit and qualified to take care of the revenues, &c., and are not therefore within the restraint of the statute of Elizabeth.(*u*)

543. Bishops may, however, grant offices for one, two, or three lives, if so they did before the 1 El., otherwise not, *Ridley v. Pownell*,(*x*) and in this case several differences were taken and agreed to by the Court, first, That the bishop of a new bishopric may grant offices of necessity ; secondly, If an office hath been usually granted by the bishop of a new bishopric for three lives, with the consent or confirmation of the dean and chapter before the 1 El. c. 19, it may be now granted accordingly ; thirdly, Be the bishopric new or old, if it was not so granted, but granted always before 1 El. for one or two lives, it cannot be granted for three lives ; fourthly, If it was

(*p*) Bishop of Sarum's case, 16 Co. 58.

(*q*) *Gee v. Friendland*, Cro. Car. 47 ; see also *Ley*, 71.

(*r*) 1 Burr. 219.

(*s*) Bishop of Sarum's case, sup. ; see also *Curle's* 11 Co. 4 ; *Gee v. Friedland*, sup.

(*t*) Bishop of Sarum's case, 10 Co. 58 ; see also *Curle's* case, 11 Co. 4 ; *Gee v. Friedland*, Cro. Car. 47.

(*u*) *Ib.* ; and see also *Ley*, 78 ; 2 Brownl. 137.

(*x*) 2 Lev. 36 ; S. C. nom. *Ridley v. Founell*, 3 Keb. 472.

[*439] granted before the 1 El. for *three lives, and after the statute but for one life, yet this shall not abridge the power of the bishop, but he may grant it for three lives,(y) see also Cro. Car. 258, March, 38, W. Jo. 311, where it was held that such grants before Elizabeth were evidence of their having been so granted.

544. Although grants of offices in reversion are held not to be good,(z) yet this must be understood of such offices only as have been always granted in possession; where on the other hand they have been usually granted as well in reversion as in possession, a grant of such office for life, when by the death or surrender of the present officer it shall become void, will be good and bind the successor, for such provision when duly confirmed may be sanctioned by custom and usage.(a)

545. Offices which are incident to others cannot be separated, so as for one to be granted and the other reserved:(b) Also, what is incident to an office will pass with it; if, therefore, a house or land belong to an office, it will pass by the grant of the office, without being expressly named.(c)

546. An office in fee granted by a subject generally may it seems be assigned,(d) and though it be an office of trust it may be granted to heirs and assigns;(e) so, an office granted to one and his assigns may be assigned;(f) but an office of trust cannot be assigned, without the assent of him who granted the office,(g) or if the patent does not mention deputy or assigns, though it be granted in fee;(h) and it is said that the office of [*440] carver could not be assigned,(h)* nor the office of forester;(i) as to executing an office by deputy, see post, § 563.

3. For what Period an Office may be granted.

547. Offices with respect to their duration are distinguished according as they are granted to a man and his heirs, or to a man for life, for years, or at will.

Those offices only are allowed to descend as inheritances where no inconvenience can ensue therefrom to the public, as the office of Earl Marshal of England, the offices of park-keeper, forester, gaoler, sheriff, &c.:(k) but, where a person has any office in himself and his heirs, he may grant them to one, in remainder to another for life, for *omne majus continet in se minus*, for as they are grantable in fee, so they may be granted in succession to one for life with remainder over.(l)

(y) Ridley v. Pownell, 2 Lev. 136; S. C. nom. Ridley v. Founell, 3 Keb. 472.

(z) See ante, § 541.

(a) Young v. Stoell, Gro. Car. 279; S. C. nom. Young v. Stowel, March, 38; see also Young v. Fowler, Cro. Car. 555.

(b) Dy. 175 a; And. 152.

(c) 1 Inst. 49, a.; Vaugh. 178.

(d) Earl of Shrewsbury's case, 9 Co. 48; W. Jo. 113; Hardr. 425.

(e) W. Jo. 113.

(f) Hob. 170; W. Jo. 113.

(g) 11 E. 4. 1; W. Jo. 121.

(h) Ib.; sed. dub., 3 Mod. 151.

(i) 4 Inst. 315.

(k) Dy. 285; Plow. 3; 2 Inst. 382; 2 Roll. Abr. 153.

(l) Plowden, 379, 381; Earl of Shrewsbury's case, 9 Co. 48; Sir George Reynell's case, Id. 97.

548. At common law all officers of justice had a life estate, and could not be removed but for misconduct, and it was the same of the office of clerk of the Crown, both in the Queen's Bench and in Chancery, and the clerks of the Exchequer, and the filacer in the Common Pleas, "In which respect (says Lord Coke) the wisdom and policy of the law was very great, because, when men held their offices for life, it was an encouragement to the faithful execution of their duty ; it was then, also, that they endeavoured to acquire knowledge and experience in their employments, having a durable and fixed estate therein, and not liable to be displaced at the pleasure of those who put them in."(*m*) For this reason it is, that the law construes the grants of offices favourably for the grantee ; therefore, if an office be granted to a man to have and enjoy so long as he shall behave himself well in it, the grantee has an estate for life, *for as nothing but his misbehaviour can determine his interest, no man can prefix a shorter period than [^{*441}] his life, since it must be his own act alone (which the law does not presume to foresee) which can make his estate of shorter continuance ;(*n*) so, if the office be granted to a man *quamdiu se bene gesserit tantum*, his estate will not be the less for the word *tantum*.(*n*)

549. Though by the 37 H. 8, c. 1, s. 3, and 1 W. & M. s. 1, c. 21, it is provided, that the *custos rotulorum* shall appoint and nominate the clerk of the peace, who may execute it by himself or deputy, for so long time only as he shall demean himself well, yet it has been held that the clerk has an office for life, and that it does not determine with the office of the *custos* ;(*o*) and so, the judges of the several courts at Westminster (who formerly held their places *durante bene placito*),(*p*) now, since the 12 W. 3, which provides that their commissions shall be *quamdiu se bene gesserent*, hold their places for life, and can be removed only upon the address of both Houses of Parliament ; so, before the 7 & 8 W. 3, c. 27, the patents of the judges, sheriffs, and commissioners of oyer and terminer, &c., were determined by the demise of the Crown, but by that act, amended by the 1 Anne, c. 1, all patent officers are continued for six months after the demise of the Crown, and by the 1 G. 3, c. 23, it is declared that the offices of the judges shall in nowise be affected by such demise.

550. The appointment of the steward of a manor court beyond the life of the grantor, was admitted by an early case to be good ;(*q*) but it was not settled that such an appointment by a subject was equally good. In Bartlett v. Downs,(*r*) it was held, that the lord of a manor may, by *deed [^{*442}] grant the stewardship of the manor and of the courts thereto belonging, for the life of the grantee ; in which case the doctrine as laid down by Lord Coke(*s*) is recognized, where he says, "If a man grant to another the office of the stewardship of the courts of his manor, with a certain fee, the grantor cannot discharge him of his service and attendance, because he hath profits which he should lose if he were discharged of his office ;"(*s*) but it

(*m*) 1 Inst. 42.

(*n*) 1 Inst. 42 ; 1 Roll. Abr. 544 ; Shaw. P. C. 161.

(*o*) Harcourt v. Fox, 4 Mod. 167.

(*q*) Earl of Shrewsbury's case, 9 Co. 48.

(*s*) 1 Inst. 233.

(*p*) 4 Inst. 74, 114.

(*r*) 3 B. & C. 616.

appears that where a plaintiff does not allege that there is any profit belonging to his office, he may be discharged by the vendee of a manor ;(*t*) so, to all grants for life of such an office as the parkership of a park and the like, a condition in law is annexed, that he should do what appertains to such office to be done.(*u*)

551. An office of trust and confidence, which concerns the administration of justice, such as the keepership of a prison, cannot be granted for years, for if it were granted for years, it would go to executors, which would be injurious to the public ;(*x*) for the same reason it was held, that the office of remembrancer of the Exchequer, and other offices in the several courts of justice, could not be granted for years ;(*x*) such offices, however, as do not concern the administration of justice, but only require skill and diligence, may be granted for years, because they may be executed by deputy without inconvenience, therefore, the office of garbler of the spices (when it existed) was adjudged to be a good grant or appointment for years, within the intent of 1 J. 1, c. 19 ;(*y*) so, a grant for years of the office of registrar of policies of assurance in London was adjudged to be good ;(*z*) so, grants for years of other offices concerning trade had in early cases been adjudged to be good ;(*a*) *but where a grant for years was made of the stewardship [443] of a court-leet and court-baron, this was held void as to the leet, being a judicial office, and good as to the court-baron.(*b*)

552. The office of sheriff may be granted by the queen *durante bene placito*, (but see 24 G. 2, c. 48, Dig. p. iii. tit. Sheriffs,) but although she might determine the office at her pleasure, yet she could not determine it for part as for a particular vill, &c., nor can she abridge the sheriff of any thing incident or appurtenant to his office ;(*c*) so, a sheriff may grant to his undersheriff to hold at will only, for, being his deputy, he must, according to the nature of a deputation, be removable at pleasure.(*d*)

If an office be granted *durante bene placito*, it shall not be determined at the will of the party, but only at the will of the queen, and, therefore, the party may surrender, and if forfeited, it shall be found by inquisition, and till a surrender or forfeiture he continues officer.(*e*)

553. A judicial office cannot be granted in reversion, for though the grantee be ever so fit a person at the time of the grant, he may become unfit when it takes effect ;(*f*) and such grant of a stewardship in remainder or reversion, or after death, was held void in Stanton and Green's case ;(*g*) and so it was adjudged in Scambler v. Waters.(*h*)

So, an office partly judicial and partly ministerial, as the office of auditor of the Court of Wards was, cannot be granted in reversion ;(*i*) but such grant has always been holden good when there is usage to support it ;(*k*) so,

(*t*) Harvey v. Newlyn, Cro. El. 859.

(*u*) Litt., sect. 378.

(*y*) Jones v. Clerk, Hard. 46, 353.

(*a*) 1 H. 7 ; 18 H. 8.

(*c*) 4 Co. 33.

(*f*) Curle's case, 11 Co. 4 ; 1 Inst. 3.

(*h*) Cro. El. 636.

(*k*) W. Jo. 311 ; Cro. Car. 49 ; Hard. 357.

(*x*) Sir George Reynell's case, 9 Co. 97.

(*z*) Dy. 303 ; Hob. 146.

(*b*) Howard v. Wood, 2 Lev. 245.

(*d*) Hob. 13 ; Noy, 55.

(*e*) 2 Salk. 466.

(*g*) Cited 10 Co. 61 ; Dy. 80, n. (58.)

(*i*) Curle's case, sup.

in case of the queen, for she has a general power to grant offices in reversion without any usage; (*l*) so, the queen *may grant an office to commence *in futuro*, or upon a contingency, which estate it is said [^{*444}] shall arise out of the inheritance she has in the office itself. (*m*) As to the persons who may or may not hold an office, see *infra*, § 554, and for what estate it may be held, see *infra*, § 578.

IV. Who may hold Offices.

§ 554. Persons generally may hold Offices.	§ 556. What Offices may be held by Persons under Disabilities.
555. Persons must be able to execute the Office.	Infants.
558. Qualification for Office.	557. Women.

§ 554. The grant of an office generally may be made to any person whom the queen pleases, for the queen has an interest in her subject, and a right to his services; (*n*) and a charter exempting persons from serving offices within the cinque ports, would not exempt them from serving the office of sheriff, (*o*) and formerly no person was excused for his neglect to qualify himself; (*p*) but the Indemnity Act which passes annually, to indemnify persons who have omitted to comply with the requisitions of the 13 C. 2, st. 2, c. 1, and 25 C. 2, c. 2, and other acts, (see Dig. p. i. tit. Oaths,) has modified the statutory provisions on that subject.

555. None can legally hold an office, but one who is of ability to execute it. If, therefore, an office which concerns the administration of justice, the queen's revenue, or the public good, be granted by the queen or a subject to one who is inexpert and incapable of executing it, the grant will be absolutely void, and the grantee be disabled by law *from holding it, for [^{*445}] none but persons of sufficient skill and ability are permitted to serve the queen and her people. (*q*)

556. Upon this principle persons under disabilities, as infants and women, can hold only certain offices; a ministerial office may be granted to an infant *exercend' per se vel deputatum suum*, (*r*) as the office of register of a bishop; (*s*) and it is said, so the grant of the office in reversion after the death of tenant for life, to an infant of the age of eleven years, *exercendum per se vel deputatum suum*, (as the usual grants are), is good, notwithstanding the infancy, *Young v. Fowler*; (*t*) and in that case, all the

(*l*) Dy. 80, 259; March, 42; R. v. Kemp, 4 Mod. 279.

(*m*) R. v. Kemp, 4 Mod. 280.

(*n*) 1 Salk. 168, citing *Earl of Shrewsbury's case*, 9 Co. 46.

(*o*) Sav. 43.

(*p*) 1 Salk. 168.

(*q*) Dy. 150; Hob. 148; 1 Inst. 3, b.; 2 Inst. 32, 456; Godb. 391; Cro. Car. 57; Dr. Sutton's case, Noy, 91; Glanvil's case, Palm. 450; Anstr. 483, 616.

(*r*) 2 Roll. Abr. 155.

(*s*) *Young v. Stoell*, Cro. Car. 279; S. C., W. Jo. 310.

(*t*) Cro. Car. 556.

justices held that it was good, notwithstanding the case cited in Co. Lit. 3, and there said to be resolved, *(u)* that the grant of an under-stewardship in possession or reversion to an infant is void, because he is incapable thereof, not having knowledge to execute it *pro commodo regis*. But this case was denied, unless it be with this difference, where it is granted with such a clause to exercise it *per se vel deputatum*, and when he is of such tender age, that he cannot by intendment execute it by himself, as being an infant of three or four years of age, who hath not discretion to execute it; but when there is a clause to execute it by deputy, it is good, for he may appoint a sufficient deputy, and if he do not elect such, it is a forfeiture. *(x)* So it seems that an infant may be a mayor. *(y)*

557. So, the grant of an office of government to a woman, which may be [446*] exercised by a substitute or deputy, will be *good, as a woman may be made regent of a kingdom; *(z)* so, an office of inheritance may descend to a woman, and by consequence may be granted to her; *(z)* so, a woman may be a gaoler, *(a)* or a commissioner of sewers; *(b)* so, she may have the custody of a castle, *(c)* or be a forester, *(d)* or sexton of a parish, and may vote in the election of one; *(e)* so, a woman may be appointed an overseer of the poor. *(g)*

558. To the holding of some offices is annexed a qualification by estate, as in the case of justices, of trustees of turnpike roads, and commissioners of sewers; see Dig. P. i. iii. tit. Justices of the Peace, P. iii. tit. Highways (Turnpikes), and P. iii. tit. Sewers.

Before the 9 G. 4, c. 17, the taking the sacrament was indispensably necessary before admission to office, and the taking the oaths of allegiance and supremacy is in most cases required of all persons for their qualification to hold office, but declarations and affirmations have been substituted in favour of Quakers and some other dissenters, and a particular oath as a substitute for the oath of supremacy and abjuration to be taken by Roman Catholics; see Dig. P. i. tit. Dissenters, P. i. iii. tit. Quakers, Roman Catholics.

[*447]

V. Execution of Offices.

§ 560. Offices that are incompatible.

561. Ministerial Offices executed by several.

Not judicial Offices.

Exception.

562. Survivorship of Office.

563. What offices may be exercised by Deputy.

Offices in Fee.

564. Offices not requiring Skill.

§ 564. Ministerial Offices.

565. Judicial Offices cannot be executed by Deputy.

566. Powers of a Deputy.

567. No Deputation without Deed.

568. Principal answerable for Deputy.

569. Exception as to the Responsibility of Superior.

(u) 40 & 41 El.; *Scambler v. Walter*, Cro. El. 637.

(x) See also 39 H. 6, pl. 32; 9 Ed. 4, pl. 5, 26; 11 Ed. 4, pl. 1; 1 H. 7, 28; Dy. 150; Hob. 142; 1 Inst. 3, and Hargrave's note (4) Co. Cop. 125; Cowp. 222.

(y) 18 Ed. 3, pl. 3; 27 H. 6, 12; 1 Inst. 43, 107, 234; but see Cowp. 222.

(z) Com. Dig. tit. Officer, (B), citing *Callis on Sewers*. 201. *(a)* 2 Inst. 382.

(b) *Callis on Sewers*, 202.

(c) Cro. Jac. 18.

(d) 4 Inst. 311.

(e) *Olive v. Ingram*, 2 Str. 1114. *(g)* *R. v. Stubbs*, 2 T. R. 395.

§ 559. The execution of an office is to be considered as to—

1. The execution of several offices by one person.
2. The execution of one office by several persons.
3. The execution of office by deputy.

1. *The Execution of several Offices by one Person.*

560. Offices are said to be incompatible and inconsistent when, from the multiplicity of duties to be discharged, they cannot be executed with care and ability. *(h)* Hence it is that the queen, though she can grant an office, cannot execute it; *(i)* so, the Chief Justice of the Court of Queen's Bench cannot be prothonotary or clerk of the papers, though he has the disposal of those offices; *(k)* so, a coroner made sheriff, ceases to be coroner; or, a parson made bishop, to be a parson; *(k)* or, a judge of the Court of Common Pleas, made a judge of the Court of Queen's Bench; *(l)* or, a remembrancer of the Exchequer, made a baron of the Exchequer; *(m)* so, the offices of mayor and town-clerk have been held incompatible because of the subordination, for the duty of the town-clerk is to attend on the mayor; *(n)* and it is now settled, that, when two offices are incompatible, the subsequent *acceptance of one vacates the other; *(o)* but, the Chief Justice of the Common Pleas being made keeper of the Great Seal, continues [^{*448}] chief justice; *(p)* so, by custom, the same person may be a judge and an officer to execute process, for he acts in different respects, as where bailiffs, or mayor and bailiffs, are judges in the court of a borough, they may also be officers to execute the process of the same court; *(q)* so, the bailiff of a manor may be the steward of a manor; *(r)* so, a mayor, who is judge of the court, may also be a gaoler. *(s)*

2. *Execution of one Office by several Persons.*

561. Ministerial offices may be granted to two or more persons, as the office of clerk of the Crown; *(t)* so, where the office of commissary was usually granted to two persons before the 1 El. c. 19. the bishop may continue to grant it to two; *(u)* but ancient offices cannot regularly be granted to two, nor otherwise than they usually have been; *(x)* and a judicial office, established at common law, cannot be granted to two or more, *(y)* as the office of chief justice or other judge; *(z)* so not the office of admiral, for it is judicial; *(a)* so not the office of prothonotary in C. P., for it is not warranted by usage, *(a)* *sed secus* as to the prothonotary in the Q. B.; *(b)* but an office established by Act of Parliament, though it be in part judicial, as auditor of

(h) 1 Dougl. 398.

(i) 4 Inst. 100.

(k) Verrier v. Sandwich (Mayor) 1 Sid. 305.

(l) Dy. 139. *(m)* Id. 197. *(n)* R. v. Pergam, 2 Keb. 92.

(o) Milward v. Thatcher, 2 T. R. 81.

(p) 1 Sid. 338; see also Dy. 159; Cro. Car. 600; Poph. 28.

(q) Crane v. Holland, Cro. Car. 138; S. C. nom. Craine v. Holland, W. Jo. 193.

(r) Gybson v. Searl, Cro. Jac. 178, citing 29 H. 8.

(s) Gabriel widow v. Clerk, Cro. El. 76. *(t)* 11 Co. 3 b; 2 Roll. Abr. 152.

(u) Jones v. Beau, 4 Mod. 17.

(x) Hare and Leisurc, Hob. 214; 4 Inst. 148; Walker v. Lambe, W. Jo. 263.

(y) Jones v. Beau, sup. *(z)* 2 Roll. Abr. 152. *(a)* 4 Inst. 146. *(b)* Show. 289.

the Court of Wards, may be so granted; (c) so, chancellor of a bishop where it is warranted by usage. (d)

[*449] *562. If a grant be made to two without saying the survivor, if one die, the survivor shall not have it; (e) but if the queen grants an office to two and the survivor, and afterwards grants to A. when the office *vacare contigerit*, the grant shall not take effect, though it be granted in reversion, till both die, for during the life of either the office is not entirely vacant. (f)

3. Execution of Offices by Deputy, or otherwise.

563. As to this point there are some offices which in their nature and constitution imply a right of exercising them by deputy; some which in their nature cannot be so exercised, and others which may be so exercised if the power be annexed to the grant, otherwise they cannot be so exercised.

Of the first description are offices of inheritance, as the office of Earl Marshal of England, forester, park-keeper, &c., which may be exercised by deputy; (g) so, also, the office of high constable of England; (h) so, he who holds a fee by personal service may make a deputy, for the estate may descend to a woman, infant, &c., who may be incapable of doing it in person; (i) and if parceners cannot agree in nominating a deputy, Chancery will direct them to draw lots who shall nominate first. (k)

564. Where nothing is required in an officer but superintendency, he may make a deputy; (l) and therefore a constable may make a deputy; (m) so, every ministerial officer may make a deputy, as a chamberlain or alderman, (n) unless where the office is granted to be executed by him in person, *then he cannot make a deputy; (o) so, an auditor in the [*450] Exchequer; (p) (but see now 4 & 5 Wm. 4, c. 17, Dig. P. i. tit. Courts (Exchequer);) so if an office of labour of small regard be granted to a peer, he, in respect of the dignity of his person, may make a deputy, as if a peer be made steward of a court-baron, parker, &c. (q)

So, a sheriff, though made by the queen's letters-patent may make a deputy; (r) so, a bishop on his creation has the power of appointing deputies; (s) and the office of clerk of the outlawries of the C. P., which belongs to the Attorney-General, is invariably exercised by deputy; (t) so, generally, every officer who may assign his office to another may make a deputy, (t) *sed secus* as to the marshal of the King's Bench Prison, (now the Queen's Prison, see Dig. p. iii. tit. Prison,) who, although he has power to grant the office for life, yet cannot authorize the grantee to make a deputy. (x)

(c) 11 Co. 3. (d) Jones v. Beau, 4 Mod. 18; see also Show. 289.

(e) Jones v. Pugh, 2 Salk. 465. (f) Auditor Curle's case, 11 Co. 4.

(g) Plowd. 380; Earl of Shrewsbury's case, 9 Co. 48; 2 Inst. 332.

(h) Keilw. 171 a. (i) 2 Inst. 34.

(k) Seymour v. Bennet, 2 Atk. 482. (l) R. Lenthal, 3 Mod. 150.

(m) Phelps v. Winchcombe, Moor, 845; S. C., nom. Phelpe v. Winscombe, Roll. Rep. 274; see also 1 Roll. Abr. 591; 3 Bulstr. 78; 1 Lev. 233.

(n) 1 Roll. 274. (o) R. v. Lenthal, 3 Mod. 150. (p) 4 Inst. 106.

(q) Earl of Shrewsbury's case, 9 Co. 49. (r) Phelpe v. Winscombe, Roll. Rep. 274.

(s) 2 Sid. 133. (t) 4 Inst. 101. (x) 39 H. 6. 34; 2 Roll. Abr. 154.

565. A judicial officer cannot as a rule make a deputy, as the Lord Chancellor;(*y*) or a justice of either bench;(*z*) so high steward of the realm, for he is a judge upon the trial of peers;(*a*) so, not a coroner, nor an escheator;(*b*) yet if a judicial office be granted *tenend' per se vel deputatum*, he may make a deputy, as the recorder of London;(*c*) so where ancient usage allows a deputy, a judicial officer may make a deputy.(*d*)

566. A deputy has power to do every act which his principal might have done, *Parker v. Kett*;(*e*) and it is there *said, that this is so essentially incident to a deputy, that a man cannot be a deputy to do any [*451] single act, nor can he be restrained by covenant to some particulars of his office, as, if the under-sheriff covenant that he will not execute any process for more than £20, without special warrant from the high sheriff, this is void, because the under-sheriff is his deputy, and the power of the deputy cannot be restrained to be less than that of his principal.(*g*) But regularly a deputy cannot make a deputy, for that imports an assignment of all his authority, which is not assignable;(*g*) but a deputy may depute another to do a particular act, as if A. be appointed steward of a copyhold court, to be exercised by himself or deputy, and he appoint B. his deputy, who authorises D. and C. to take a surrender of a copyhold tenement, the surrender will be good, being only a single act.(*g*) A deputy, however, ought to act regularly in the name of his principal, as an under-sheriff does all in the name of the sheriff,(*g*) and all his acts are in right of his principal, and as his servant;(*h*) but an act by a deputy in his own name will be good, except in special cases.(*i*)

567. As an office is a thing which lies in grant, regularly an officer cannot be appointed without deed, so neither can there, according to the better opinion, be a deputation without deed;(*j*) although it has been said that the deputation of an office is in its own nature grantable by parol, and, therefore, though it should happen to be granted in writing, yet since it is in itself grantable by parol, it may be revoked by parol.(*k*)

An under-sheriff may, however be appointed by parol, for he claims no interest in the office, but as a servant;(*l*) so, a high constable may appoint a deputy by parol.(*m*)

*568. By the 2 H. 6, c. 10, it is provided, that all officers who are by their letters-patent to appoint clerks and ministers, shall be [*452] charged to appoint such for whom they will answer at their peril, and regularly, all officers shall answer for their deputies;(*n*) so, the franchise of a lord shall answer for a bailiff put in by him;(*o*) and upon the rule of *respondet superior*, regularly, all officers shall answer of their deputies,

(*y*) 4 Inst. 88.

(*z*) 1 Roll. Abr. 274.

(*a*) 4 Inst. 49.

(*b*) Lill. Reg. 446.

(*c*) 1 Lev. 76.

(*d*) 4 Inst. 126, 128.

(*e*) 1 Salk. 95; S. C., 1 Ld. Raym. 658.

(*g*) *Parker v. Kett*, 1 Salk. 95; S. C. Ld. Raym. 658.

(*h*) 11 E. 4. 1 b.

(*i*) *Parker v. Kett*, 1 Salk. 96.

(*j*) *Gawton and Lord Daere's case*, 1 Leon. 219; *R. v. Lenthal*, 3 Mod. 147.

(*k*) Ca. Law. and Eq. 74.

(*l*) *Clecott v. Denys*, Cro. El. 67.

(*m*) *Midhurst v. Waite*, 3 Burr. 1259.

(*n*) 2 Inst. 466.

(*o*) *Dean and Chapter of St. Paul's case*, cited 2 Lev. 169.

in the same manner as if the acts were done by themselves, *(p)* unless it be in criminal cases, therefore, sheriffs shall answer for the escapes, amerciaments, &c. of their deputies; *(p)* so, where the warden of the Fleet in fee granted the office for life to A., who suffered escapes, he, and not A. was held liable; *(q)* so, where a person was appointed collector of the customs in a certain port, who was empowered by the 1 El. c. 12, to appoint a deputy, and a deputy so appointed by him concealed the goods of a merchant, and the customer being ignorant thereof, returned on oath into the Exchequer the customs of this port, according to the information of his deputy, it was held, that he should, notwithstanding his ignorance, answer for the act of his deputy; *(r)* but if a clerk in an office mis-enter anything, it was held, that he himself should be punished, and not the master of the office, because he took a fee for it. *(s)*

569. Generally, an act of the deputy, without the assent of his superior, will not be a forfeiture of the office, as the act of an under-sheriff or under-bailiff is not a forfeiture of the office of the sheriff or bailiff in fee; *(t)* but it seems from other cases that if a deputy suffers escapes, it is a forfeiture by the principal, unless such deputation be made for life, and then the grantee for life only forfeits the office, *(u)* see further Dig. P. iii. tit. Prisons.

[*453] *So it has been said, that though a *mandamus* will not lie for a deputy, yet it lies for him who disputes him, to have such deputy either admitted or restored, for that otherwise he might be deprived of his power to make a deputy. *(x)*

VI. What Estate may be had in an Office.

§ 570. Estate in an Office to a man and his
Heirs.
Entail of Offices.
571. Estate for Life in an Office.

§ 572. Curtesy in an Office.
573. Dower in an Office.
574. No Trust can be created in an Office.

§ 570. Many offices are hereditary, and having existed time out of mind, may be said to be derived from immemorial usage, or they may be granted to a man and his heirs, or for life, for years, or during pleasure only, see ante § 547 et seq. *(y)*

Many offices in fee may be settled and confirmed to the heirs of the body of the grantee, as the office of the Earl Marshal of England; *(z)* so, there may be an estate tail of the office of steward, receiver, or bailiff of a manor,

(p) 4 Co. 33; 2 Inst. 466.

(q) Plummer v. Whitecott, 2 Lev. 158.

(r) Dy. 238, pl. 38.

(s) 1 Leon. 146.

(t) 2 Inst. 190.

(u) R. v. Lady Boughton, 2 Lev. 71. See also Dy. 278; Cro. El. 534; Poph. 119.

(x) R. v. President, &c., of the Marches, 1 Lev. 306; S. C., 2 Keb. 738; S. C. 1 Vent. 110.

(y) Dy. 285; Earl of Shrewsbury's case, 9 Co. 48; Reynell's case, 9 Co. 99; 2 Inst. 382.

(z) 1 H. 7, 28, cited in Nevil's case, 7 Co. 33; but see Show. P. C. 1, where the doctrine laid down in that case is called in question.

because it is exercisable within lands; (a) so, of the chamberlainship of the Exchequer; (b) so, it may be granted by a man to be regranted to himself and the heirs male of his body; (b) or there may be a covenant to stand seised of it to the use of another; (c) but it has been held, that the great chamberlainship of England, being inherent in the blood of the first grantee, was incapable of alienation, and could not therefore be entailed. (d)

*571. At common law all offices of justice were grantable for life, (see ante, § 548,) but it is said, that when the queen grants an [*454] office at will, though she should grant to the patentee a rent for his life for exercise of the same, yet this was no absolute estate for life, because the rent being granted on account of the office, and in discharge of the duties of the place, whenever his interest in the office ceased, the rent would determine also, being originally granted for the exercise of the office in which he ceased to be concerned. (e)

An office granted for life may be granted with remainder over to another for life. (f) So, the lord of a manor may by deed grant the stewardship of the manor of the courts thereto belonging, for the life of the grantee, so as to bind the future owners of the manor. (g)

572. Curtesy and dower are both incident to offices of inheritance. From an early case cited by Lord Coke, it appears that John Duke of Lancaster claimed to exercise the office of seneschal of England, at the coronation of Richard 2, as tenant by curtesy, which claim was allowed; and a similar claim was made at the same coronation by John Dymock, to the office of King's champion, which was in like manner allowed. (h)

573. So, a woman may be endowed of an office of inheritance, as of the office of the marshalsea, to have the third part of the profits, and in such case she shall be contributory to a third part of the charge; so, she may be endowed *de tertiâ parte exituum provenient, de custodiâ gaolæ Abbath. Westm.*, or of the third part of the profits of courts, fines, heriots, &c. (i)

*574. In *Bellamy v. Burrow*, (k) it was held, that a trust might be created of an office, and that an office might be granted to one in trust [*455] for another, but subsequent decisions have made this doctrine very questionable; thus, in *Law v. Law*, (l) where A., by his interest with the commissioners of excise, got an office in that branch of the revenue for B., who in consideration thereof gave a bond to A. to pay him £10 per annum as long as B. enjoyed the place, equity would relieve against the bond; so in *Parsons v. Thompson* (m) and *Garforth v. Fearn*, (n) it was held, that if an action for money had and received were brought upon the footing of an agreement to allow a certain proportion of the profits of the office, in consi-

(a) 1 Inst. 20, a; 1 Roll. Abr. 838.

(b) W. Jo. 114.

(c) Id. 118. See also Comb. 196; 3 Mod. 145.

(d) W. Jo. 96, per three justices contra Crew, C. J.; Collins' Claims, Peer. 181.

(e) 1 Inst. 42, a.

(f) Earl of Shrewsbury's case, 9 Co. 48.

(g) *Bartlett v. Downes*, 3 B. & C. 616.

(h) Coll. Claims Peer. 5.

(i) Plow. 379; Perk. 342; F. N. B. 149; 1 Inst. 32, a.

(k) Ca. temp. Talbot, 97.

(l) Id. 140.

(m) 1 H. Bl. 322.

(n) Id. 327.

deration of his having procured or been aiding to the defendant's appointment to it, the plaintiff could not recover; in the latter of these cases it is said, "The appointment of any customer contrary to the 12 R. 2, c. 2, is a misdemeanor. The statute, though very ancient, is certainly not obsolete, it is the statute under which they are sworn in the Exchequer. It not only prohibits the appointment, but goes on to say, that 'none that pursueth by him or by orders, privily or openly, to be in any manner of office, shall be put in the same office or in any other,' and the 5 & 6 Ed. 6, c. 16, makes void all promises, bonds, and assurances, as well on the part of the bargainer as the bargainee;"(o) so, where A. and B., part owners of a ship, and also husbands or managing owners, sold a part of their interest to C., and the deed contained a covenant that C. should be appointed to the command of the ship, and that A. and B. should continue husbands, it was held, that though the covenant to continue C.'s agents in the concern of the ship might be lawful if it stood alone, yet the deed being founded on a contract for the sale of the shares, with a stipulation for the appointment to the command, and the continuance of the management, it was illegal and void, [*456] *inasmuch as it was contrary to the interest of the charterers and the other owners,(p) see further, as to the sale of offices, Dig. p. iii. tit. Offices.

575. There may also be a reversionary interest in an office.(q)

VII. How an Office may be forfeited or lost.

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| § 576. Forfeiture of an Office by Abuser. | § 585. Loss of Office for insufficiency. |
| 577. Forfeiture of an Office by Non-user. | 586. Scire Facias, when necessary. |
| 578. Where Non-attendance is no Forfeiture. | 587. Loss by Sale of Office. |
| 579. In respect of private Matters. | What Offices within the Statute, or otherwise. |
| 580. Breach of Condition. | 588. Sale of Office, how far illegal at Common Law. |
| 581. Forfeiture by Refuser. | 589. Loss of Office by Acceptance of another Office. |
| 582. Forfeiture by whose Act. | 590. By Destruction of the Thing to which the Office is annexed. |
| Tenant in Tail. | 591. By Neglect to qualify. |
| Officer for Life. | 592. By Demise of the Crown. |
| Deputy. | 593. By Surrender. |
| 583. Joint Officers. | |
| 584. Forfeiture to the Crown. | |

§ 576. To every grant of an office is annexed a condition in law, that the officers shall do that which to the office belongs, and for breach of the condition the office is forfeited.(r) An office may be forfeited three ways, namely, by abuser, by non-user, and by refuser.

(o) Per Ld. Loughborough, Ib.

(p) Card v. Hope, 2 B. & C. 661.

(q) See ante, § 544.

(r) Litt., s. 378; 1 Inst. 233. See also Bartlett v. Downes, 3 B. & C. 617.^b

^aEng. Com. Law Reps. ix. 209.

^bId. x. 201.

Wherever an officer acts contrary to the nature and duty of his office, the same is forfeited; (s) as if a gaoler suffers voluntary escapes, (t) or is guilty of extortion; (u) so, if a sheriff suffer a felon to escape, whether voluntarily or negligently, it is a forfeiture, though the office be for life or in *fee; (x) but one negligent escape is not a forfeiture, though it is otherwise with a voluntary escape, or with two negligent escapes; (y) [*457] but the act of forfeiture by a gaoler, who has but a particular estate, as for life or years, does not affect him in reversion or remainder who has the inheritance, whose title shall immediately accrue upon such forfeiture, and not go to the queen. (z)

So, it is to be understood, that if any keeper kill any deer without warrant, and convert them to his own use, or cut any trees or underwood, it is a forfeiture of his office. (a)

577. With respect to non-user of an office, a distinction is to be taken where the office concerns the administration of justice or the commonwealth, and when it concerns a private individual. (b) In the first case, the officer *ex officio*, or of necessity, ought to attend without demand or request; in this case, therefore, by non-user or non-attendance, the office is forfeited, as the office of chamberlain, the Exchequer prothonotary, clerks of the warrants, &c., in the Common Pleas, for the attendance of these officers is of necessity for the administration of justice, and the attendance of the clerk of the market is of necessity for the commonwealth.

578. So, non-attendance is a good cause of forfeiture of the office of recorder, his office being a public office relating to the administration of justice. (c) But, when the officer ought not to attend and exercise his office but upon demand or request of him to whom he is officer, there non-attendance is no cause of forfeiture without demand or request made, as where the office of steward is granted to one to *hold courts when he shall be required, it is implied in the grant that he is not bound to hold courts [*458] but upon request, and non-attendance without request made is no cause of forfeiture; (d) so, if a man grants an annuity *pro consilio impendendo*, he is not bound to give counsel, but upon request made. (e) But bare non-attendance will not be a cause of forfeiture; therefore, where the king gave a license to a serjeant-at-arms for not attending the Chancellor, it was no forfeiture, though the license was only by parol; (f) so, if an officer be imprisoned for a misdemeanor in his office, non-attendance during his imprisonment is no forfeiture, (g) particularly if the non-attendance arise from sickness or other inevitable accident. (h)

(s) 1 Inst. 233.

(t) R. v. Lenthal, 3 Mod. 143.

(u) R. v. Lady Boughton, 2 Lev. 71.

(x) Sir John Savage's case, Dy. 151 b; 2 Roll. Abr. 155.

(y) 39 H. 6, c. 33; 2 Roll. Abr. 155; 2 Vern. 173.

(z) R. v. Lady Boughton, 2 Lev. 71. See also Poph. 119.

(a) 1 Inst. 233, citing 15 E. 4. 3, b.

(b) Earl of Shrewsbury's case, 9 Co. 50.

(c) R. v. Ipswich (Bailiffs, &c.), 2 Salk. 435; S. C., 2 Lord Raym. 1233. See also 4 Burr. 1999.

(d) Ib.

(e) 39 H. 6. 22, cited Earl of Shrewsbury's case, 9 Co. 50; Bruin's case, Dy. 369.

(f) Moor, 193.

(g) R. v. Rooks, Cro. Car. 492.

(h) Ib.; R. v. Wells (Corporation), 4 Burr. 1999.

579. When the office relates to any man's private concerns, and the officer ought *ex officio* to attend his office without request, there the non-user or non-attendance is no cause of forfeiture unless the non-user or non-attendance is cause of prejudice or damage to him whose officer he is, in something which concerns his charge, as if a parker does not attend one or two days, and within those days no prejudice or damage happens, it is no forfeiture, but if by reason of his absence persons unknown kill any deer, it is a forfeiture of his office, and therewith agrees 5 E. 4. 6, cited Earl of Shrewsbury's case.(i)

580. If conditions in law which are annexed to offices be not observed and fulfilled, the breach is a cause of forfeiture, whether it be by non-user or abuser;(j) therefore, in the case of a searcher of customs in a port town, if neither the searcher himself nor any of his deputies attend, though it do [*459] not appear *to be from actual negligence, yet this voluntary absence by himself and his servants is deemed not *crassa negligentia* merely, but a voluntary omission and forfeiture;(k) so, too, "If a gaoler leaves the prison doors unlocked, and the prisoners escape, it is to be considered not only a negligent, but a voluntary escape;"(l) for these conditions, being *pro commodo regis et populi*, are held to be as strong and binding as express conditions;(m) and, therefore, though the office of forester, or the like, descend to an infant, or *feme covert*, (where by law they may so descend), yet if they are not exercised by sufficient deputies, they become forfeited, notwithstanding the natural debility of the principal;(n) so, if a parker or forester cut down trees for reparations, so as not to leave sufficient for browse, shade, and cover for the game, this will be a forfeiture, because he breaks the condition annexed in law to his office, that he will preserve the game and not do any thing that may diminish and destroy them.(o)

581. As to refusal, in all cases where an officer is bound upon request to exercise an office, if he neglects to do it upon such request, he forfeits it, as if the steward of a manor is requested by the lord to hold a court, which he doth not, it is a forfeiture;(p) so, as a recorder is bound to attend and assist at the sessions, to direct a corporation in the proceedings of justice, his non-attendance was held to be a cause of forfeiture;(q) but it must be a general refusal or neglect to attend, to occasion such a forfeiture.(r)

[*460] 582. If tenant in tail of an office commit a forfeiture, *this shall bind the issue by force of the condition *tacite* annexed by law to the estate;(s) but if an officer for life commit a forfeiture, this shall not affect him that hath the inheritance.(t)

If the deputy of an office in fee does any act by which the office is for-

(i) 9 Co. 50 b.

(j) 11 E. 4. 1, b.

(k) R. v. Rooks, Cro. Car. 492.

(l) Per Curiam, Ib.

(m) Litt., sect. 378, 379; 1 Inst. 233, 234.

(n) 8 Co. 44; Cro. Car. 556; Hard. 11.

(o) Litt., sect. 378, 379; 1 Inst. 233; Pembroke v. Berkeley, Cro. El. 385. See also Poph. 119; 1 And. 29; Moor, 707; 2 Mod. 121.

(p) Earl of Shrewsbury's case, 9 Co. 50 b.

(q) Serjeant Whitacre's case, 2 Salk. 435; S. C., 2 Ld. Raym. 1233.

(r) R. v. Wells (Corporation), 4 Burr. 1999.

(s) Nevil's case, 7 Co. 34 b, citing 22 Ass. 34; 8 H. 4. 18; 39 H. 6. 32; 11 E. 4. 1; 20 E. 4. 5, 6; Nevil's case, Plow. 370.

(t) R. v. Lady Broughton, 2 Lev. 71. See also Poph. 119; 2 Roll. Abr. 155.

feited, the inheritance of the office is thereby lost; (*u*) but if a person having an office of inheritance, grants a lease of the same for life and the lessee commits a forfeiture, the office for life is forfeited to him in reversion and not to the Crown. (*v*)

583. Where an office is granted to two, and one of them is attainted of treason, the other shall not forfeit; therefore, where the office of guardian and keeper of the park was granted to two, with a certain fee, during their lives, and the longest liver of them, to be exercised by them or their sufficient deputy, for whom they should answer, and one of them was attainted, it was held, that, being only an office of skill and confidence, the same was not forfeited, but that the other should hold the same with the profits incident thereto; (*x*) but where it is an office of trust and confidence, and one of the joint officers is attainted, the entire office is forfeited to the queen, for she cannot make one to occupy in common with another. (*y*)

584. If an office be forfeited, the Crown, as a rule, shall have the benefit of the forfeiture, (but see *supra*, § 582,) and, therefore, where a statute makes an office void for any cause, the queen shall have the forfeiture; (*z*) so, where the *office of archdeacon's register was forfeited under the 5 & 6 E. 6, c. 16, against the sale of offices, it was held, that the [*461] archdeacon being disabled, the king as supreme ordinary should have the nomination. (*a*)

585. Besides the above-mentioned causes of forfeiture, an office may be lost by other causes, as insufficiency, or inability to execute it, thus, if a superior put a deputy into an office, exerciseable by deputy, who is ignorant and unskilful, or otherwise unable to fulfil the duties attached to it, this is a forfeiture of the office by the principal, and the grant is void, and the officer removable; (*b*) so, though the queen herself grant an office in any of the courts of Westminster to a person who is insufficient, the judges, who are the proper persons to decide upon his abilities, are the proper persons to remove him; therefore, where a filacer of the C. P. was absent from his office for two years, and had farmed out his office from year to year, without license from the Court, he was discharged by the chief justice, *ex assensu sociorum suorum*, by words openly spoken in court; (*c*) so, an officer was turned out, because that he *spoliavit quædam recorda contra officii sui debitum*; (*d*) so, a clerk of the peace is removed for not delivering the records to the new *custos rotulorum*. (*e*)

586. But an officer, who holds his office by patent, cannot be turned out without a *scire facias*. (*f*)

(*u*) Bro. Abr. tit. Deputy, pl. 7. See also Dy. 278; Cro. El. 534; Poph. 119.

(*v*) R. v. Manlove, 3 Lev. 288; S. C., 2 Salk. 469, recognizing Lady Broughton's case, *sup.* (x) Nevil's case, Plowd. 378.

(*y*) Id. 380. See also Brook, tit. Office, pl. 51. (z) R. v. Manlove, 3 Lev. 289.

(*a*) Woodward v. Foxe, 2 Lev. 289; S. C., 2 Vent. 187.

(*b*) 4 Mod. 29, 30, Arg. (c) Dy. 114 b. pl. 64; S. C., 1 Roll. Abr. 155.

(*d*) Pilkington's case, 1 Keb. 597.

(*e*) R. v. Evans, 4 Mod. 31, 32; S. C., Show. 282; S. C., 12 Mod. 13. See also Carth. 426; Ld. Raym. 158, 166; 2 Str. 996; Holt, 88, pl. 1.

(*f*) Dy. 155, 198, 211; 8 Co. 44; 9 Co. 93; 1 Inst. 233; Cro. Car. 60; 1 Roll. Abr. 580; 3 Lev. 288; 1 Sid. 81; 3 Mod. 335.

So, though an officer be removed for insufficiency, it is said that he cannot be abridged of his fee during his continuance.(g)

[*462] *587. Again, an office may be lost by a sale thereof within the 5 & 6 E. 6, c. 16, and this statute extends to all offices which concern the administration of justice, as well in the spiritual courts, as in the courts of common law;(h) so, to the office of warden of the Fleet;(i) so, to all offices which concern the revenue of the Crown,(k) as to the cofferer of the king's household,(l) or surveyor of the customs,(m) and it will be within the statute if a man for money, &c., surrender such an office, to the intent that the queen may grant it to another;(n) so, an obligation for the performance of covenants in an indenture will be void if there be anything relating to the sale of an office;(o) so, where a trust is created, it is clearly within the statute;(p) so, an assignment of the emoluments of the office of clerk of the peace is invalid.(q) But the office of bailiff of a hundred is not within the statute, for it is not a place of trust;(r) so, not a place in the Six Clerks' Office, for it is merely a ministerial office;(s) so, not an office of inheritance;(t) so, not an office for life or years derived from an office of inheritance;(u) so, it is not within the statute if a deputy gives a bond to pay a moiety of the profits to his principal, for that amounts only to an allowance of the other moiety to the deputy for his trouble;(x) or a sum in gross out of the profits, for if the profits do not amount to it, it shall not be paid;(y) so, a less sum certain where the profits are uncertain;(y) so, the [*463] statute does not extend to *commissions in the army;(z) so, not to the office of private secretary;(a) so, not to pages of the presence.(b) So, before 6 G. 4, cc. 82, 83, the sale of offices in the courts of Q. B. and C. P. was not unlawful, see further as to the sale of offices under the different statutes, Dig. P. iii. tit. Offices.

588. It appears that the offering a bribe for procuring an appointment to a public office was a misdemeanor at common law;(c) and it has been decided, that the appointment of captain of an East-Indiaman, although not within the statute, (see *supra*, § 587,) cannot be sold by the owner without the consent of the East India Company, such a sale being held contrary to a by-law of the company and also to the principles of public policy;(d) and

(g) Cro. Jac. 17, 18. (h) 3 Inst. 148; 12 Co. 78; Cro. Jac. 269; 2 Vent. 267.

(i) Huggins v. Bambridge, Willes, 241.

(k) 1 Inst. 234.

(l) Ingram's case, Cro. Jac. 386.

(m) 2 And. 55.

(n) 1 Inst. 234; 2 And. 57.

(o) 2 And. 57.

(p) Fordice v. Willis, 3 B. C. C. 579. See ante, § 574.

(q) Palmer v. Bate, 2 B. & B. 673; S. C., 6 J. B. Moore, 28.

(r) Godbolt's case, 4 Leon. 33.

(s) Sparrow v. Reynolds, Bac. Abr. tit. Offices, (F.)

(t) Willes, 245.

(u) Ellis v. Ruddell, 2 Lev. 151.

(x) Gulliford v. De Cardonell, 2 Salk. 466; S. C. nom. Culliford v. Cardonell, 1 Com. 1.

(y) Godolphin v. Tudor, 2 Salk. 468.

(z) Ive v. Ashe, Prec. in Chan. 199; Symonds v. Gibson, 2 Vern. 308; Morris v. McCulloch, Ambl. 432. See also 5 Burr. 2698; 1 H. Bl. 326.

(a) Harrington v. Klopogge, 2 B. & B. 678, n.; S. C., 6 J. B. Moore, 31, n.; 2 Chitt. Ca. temp. Mansfield, 475.

(b) Harrington v. Du Chatel, 1 B. C. C. 121.

(c) R. v. Vaughan, 4 Burr. 2494; R. v. Pollman, 2 Campbell, 230.

(d) Blachford v. Preston, 8 T. R. 89.

any private agreement entered into between parties for procuring an appointment, without the knowledge of the person who has the power of appointing, has been held to be such a fraud upon him as would avoid the covenant, whether the office be lawfully saleable or not.(e)

So, courts of equity acting upon the spirit of this statute have interposed at different times to set aside bonds and annuities given in regard to such offices;(f) therefore where a person gave a sum of money to another for procuring him a commission in the marines, the bargain was decreed to be void;(g) so, where bonds were given to secure the payment of annuities granted in consideration of *recommending certain parties to be [*464] pages of the presence, a perpetual injunction against the bonds was granted upon the public policy of law, although the office was not within the 5 & 6 E. 6.(h)

589. An office may likewise be lost by the acceptance of another office that is incompatible therewith, as if the one office be under the control of the other, therefore if the remembrancer of the Exchequer be made a baron of the Exchequer;(i) but acceptance of an incompatible office has been held not to operate as an absolute avoidance of a former office,(j) see further, ante, § 560.

590. So, an office may be lost by destruction of the thing to which the office is annexed, as if one grants the office of parker and afterwards destroys his park, the office with all casual fees is gone, Howard's case;(k) and it is there said, that "although it be true that an officer, who hath the grant of an office for life or years, and is to have the profit of casual fees, as steward, bailiff, or parker, cannot be discharged of the office, for then he should not have his casual fees, that is to be understood that the grantor cannot appoint another, where the park or manor continues, but when the park itself is determined, and disparked, the office which is appendant thereunto shall be also determined."(l)

So, if a corporation be dissolved or surrender, the office of recorder, town-clerk, &c. is gone;(m) but if the queen or another grant to an officer a collateral fee, as £20 *per annum* for his life, for the exercise of his office, that does not determine on the determination of the office.(n)

591. By the 13 C. 2, c. 1, and 25 C. 2, c. 2, all persons admitted to any office of trust were required to take certain *oaths and also the sacrament, as a qualification for their holding office; but these Acts have [*465] been either repealed or considerably altered by subsequent statutes. Under one of these, the 5 G. 1, c. 6, it has been held that since that statute the election of a person who had neglected to qualify within the time prescribed was not void, but voidable,(n) see further Dig. P. i. tit. Oaths, Affirmations, P. ii. tit. Corporations, P. iii. tit. Roman Catholics.

(e) *Waldo v. Martin*, 4 B. & C. 319; 5 S. C., 6 D. & R. 364; 2 C. & P. 1.

(f) *Fonbl. Treat. Eq.*, b. 1, c. 4, s. 4.

(g) *Morris v. McCulloch*, *Ambl.* 432.

(h) *Harrington v. Du Chatel*, 1 B. C. C. 124. See also *Hartwell v. Hartwell*, 4 Ves. 811.

(i) *Dy.* 197 b.

(j) *R. v. Patteson*, 4 B. & Ad. 9.

(k) *Cro. Car.* 60.

(l) *Per Curiam*, *Ib.*

(m) *Howard's case*, *Hutt.* 87.

(n) *Crawford v. Powell*, 2 Burr. 1017.

592. So by the common law, all patents of justices of the Courts of Q. B., C. P. and Exchequer, as also of sheriffs, escheators, commissioners of *oyer* and *terminer*, &c., and Attorney-General, determined by the demise of the Crown; but the 7 & 8 W. 3, c. 27, 1 A. c. 8, and 4 A. c. 8, have provided that such offices shall continue for six months, unless sooner determined by the successors; and in regard to the judges, the 1 G. 3, c. 23, has declared that they should not be affected by any such demise. So, the office of sheriff, in places where he is chosen by a corporation, having by its charter the inheritance of the office in them, does not determine by such demise, (o) nor the authority of a coroner or verderor; (o) so, no corporate officer, who, by the charter, is invested with judicial authority, shall lose it by such demise. (p)

593. Lastly, an office may be lost by surrender, as if an officer surrender his patent in chancery; (q) but if the patent itself be not surrendered to be cancelled, nor a *vacatur* entered of the inrolment, nor an entry made of the surrender in the life of the Master of the Rolls, though there be an entry upon record, that it was surrendered before the Master of the Rolls, it is not a good surrender. (r)

594. An office may be suspended as well as absolutely forfeited, but it has been held that inasmuch as the queen *may take advantage of [*466] a forfeiture, either by *scire facias*, inquisition, or information, if she suspend an officer without adopting any of these modes, the officer will be entitled to receive his salary. (s)

VIII. Disturbance of an Office, and the Remedies.

§ 595. What a Disturbance, or otherwise.	§ 596. Action on the Case. *
Where an Action lies, and in what Courts.	597. Action for Fees, &c., to try Title. Quo Warranto not grantable, when.

§ 595. In an early case, (t) it was decided, that threatening to beat a man, to prevent him from exercising an office, was not a disturbance; but in the Earl of Shrewsbury's case, (u) holding courts and taking fees was declared to be a disturbance.

Before the abolition of assizes, by the 3 & 4 W. 4, c. 27, see Dig. P. iii. tit. Limitations,) it was held clearly that this real action lay at common law for an office, and not only for offices in fee but also for those in tail or for life, (x) and the plaintiff might then elect to have an assize or an action on the case for a disturbance. (y)

An assize lay for the office of registrar of the Admiralty; for though their

(o) Dy. 165; Dalis, 15; 2 Inst. 175.

(q) 11 E. 4, 1 b.

(s) Slingsby's case, 3 Swanst. 178, n. (r).

(t) 10 E. 4, 10 b, and 11 a, cited in argument 9 Co. 51 a.

(x) Webb's case, 8 Co. 47 a.

(p) 7 Co. 30 b.

(r) Dy. 195.

(u) 9 Co. 51.

(y) Earl of Shrewsbury's case, 9 Co. 51.

proceedings are according to the civil law, yet the right of their offices is determinable at common law ;(*z*) so, of the mastership of an hospital, being a lay fee ;(*z*) so the right of the office of registrar to a bishop is to be determined at common law, and not to be tried in the spiritual court, though the subject-matter is spiritual, because the office itself being matter of freehold, is for that *reason of temporal cognizance ;(*a*) but a *mandamus* will not lie to restore a proctor to his office that being a matter properly [*467] cognizable in the spiritual courts.(*b*)

596. An action on the case will, as it seems, lie for the disturbance of a parish clerk in the exercise of his office.(*c*) So, a man may bring an action on the case for the profits of an office though he never had seisin ;(*d*) but if the perquisites of an office are mere gratuities, not known and accustomed fees, no action will lie to recover them.(*e*)

597. So, an action for money had and received may, in some cases, be brought as a convenient mode of trying title to an office, as where the king granted the office of comptrollers of the customs to A. and B., and A. died, and after the king granted the said office to C., and yet B. under pretence of survivorship exercised the said office, held, that, as a grant at will to two persons, it was determined by the death of one, and that C. might maintain an action of *indebitatus assumpsit* for so much money had and received to his use ;(*f*) so, where a defendant claimed title to hold courts leet as well as courts baron,(*g*) for offices of this kind are not of sufficient importance for the Court to notice them by way of information,(*h*) and a rule to shew cause was refused in the case of a churchwarden ;(*i*) but where there were no fees for which an action would lie, it was held, that an information in the nature of *quo warranto* will lie for the bailiff of a court-leet, being a prescriptive officer, and having power to summon and select the jury.(*k*)

*SECTION XII.

[*468]

DIGNITIES.

§ 598. Dignities appendant to Land.

§ 598. Dignities are another species of incorporeal hereditaments, which being originally annexed to land, are reckoned as real property ; for the possessors of such dignities were in right of those estates allowed to be peers of the realm, and upon the alienation of the same passed as appendant.(*l*) This subject may be considered under the following heads :—

(*z*) Dy. 152 ; 2 Inst. 412 ; 8 Co. 47.

(*b*) Lee's case, Carth. 169.

(*d*) 1 Mod. 122.

(*f*) Arris v. Stukely, 2 Mod. 260 ; S. C., T.

(*g*) Howard v. Wood, 2 Lev. 245.

(*i*) R. v. Shepherd, 4 T. R. 381.

(*l*) 1 Com. 400.

(*a*) 2 Roll. Abr. 285.

(*c*) Lee v. Drake, 2 Salk. 463, pl. 7.

(*e*) Boyter v. Dodsworth, 6 T. R. 681.

Jo. 126 ; 1 Danv. 27 ; 2 Show., pl. 14.

(*h*) R. v. Mein, 3 T. R. 598.

(*k*) R. v. Bingham, 2 East, 308.

1. How distinguished.
2. How claimed or created.
3. What estates may be had in a dignity.
4. How lost or recovered.

I. *How Distinguished.*

§ 599. Degrees of Nobility.

§ 599. Persons of dignity are either noble or under the degree of nobility, or they are distinguished into superior and inferior nobility. The superior nobility are distinguished by the titles of duke, marquis, earl, viscount, and baron. The inferior nobility are baronets, knights, esquires, and gentlemen. (*m*)

Nobility gives so high a dignity to the person possessing it as to supply both his Christian and surname in all legal instruments; and in legal process, the omission of a name of dignity may be even pleaded in abatement, [*469] and where a *peer has more than one name of dignity, he must be named by the most noble; (*n*) but no temporal dignity of any foreign nation can give a right to a higher title in this country than that of esquire. (*o*) Therefore a duke, earl, &c., of another kingdom, are not to be sued by those names here, for that they are not peers of Parliament. But by the Act of Union with Scotland, 5 A. c. 8, art. 4, it is declared that all peers of Scotland shall be peers of Great Britain, and rank next after those of the same degree at the time of the Union, and shall have all the privileges of peers except sitting in the House of Lords, and voting at the trial of a peer; and the Act of Union with Ireland, 39 & 40 Geo. 3, c. 67, art. 4, provides that the peers of Ireland shall, as peers of the United Kingdom, enjoy all privilege of peers, except sitting in the House of Lords and at the trial of a peer, and that the peers of Ireland at the time of the Union shall have precedency next after the peers of the same degree in great Britain, and all peerages of Ireland and of the United Kingdom subsequently created are to rank according to the dates of their creation. As to the precedence of foreign dukes, earls, &c., it is said that it differs not, though they have not voice in Parliament. (*p*)

II. *How acquired or treated.*

§ 600. Acquired by Prescription.
 601. Creation by Writ.
 602. Creation by Patent.

§ 603. Creation by Act of Parliament.
 604. Acquired by Marriage.

(*m*) 2 Inst. 583.

(*n*) 2 Hawk. P. C. 185. 230.

(*o*) 2 Inst. 667; Spelm. Gloss. voc. Armiger; Dodd. Nob. 144.

(*p*) See Hal. MSS., cited Harg. Co. Litt. 16, b., n. (92.)

§ 600. A man may have a title to nobility or dignity by prescription or tenure,(g) and in some few cases, as that of the earldom of Arundel, this claim has been allowed;(r) *and the estates and dignities attached the castle of Arundel are now vested in the family of the Duke [*470] of Norfolk. In the late case of the Berkeley peerage this claim was rejected.(s)

601. So, a man may be created by writ, as if the queen by writ of summons require any one to come to Parliament, and upon that he sits in the House of Peers, he is then baron,(t) and this was the ancient way of creation;(t) but he is not a baron if he die before the return of the writ,(u) or if he never sit in Parliament by force of the writ.(u)

It was formerly held, that as dignities were annexed to land, the naming of some place was necessary in the creation of a dignity, but it has since been decided that it is not necessary, and in *R. v. Knollys*,(x) it is said that the naming a place is not essential in the creation of a dignity, and the earldom of Rivers is cited as an instance where no place is named. So, in Lord Purbeck's case,(y) a distinction was taken between ancient honours as being feodary and officary, and having relation to a place, and modern dignities, as being titular and personal, notwithstanding the formality of naming a place in the creation.

So, in the opinion of some, he must be invested according to the usual form of investiture, in order to make the dignity hereditary.(z)

So, the eldest sons of peers may be called, by writ of summons, by the name of title of a barony vested in their fathers, because in that case there is no danger of his children's losing their nobility in case he never takes his seat, for they will succeed to their grandfather; and where the father's barony is limited to him and the heirs male of his body, and his eldest son is called up to the House of Lords *by writ, with the title of this barony, the writ in this case will not create a fee or general estate, so [*471] as to make a female capable of inheriting the title; but upon the death of the father the two titles unite and become one and the same.(a)

602. So, a man may be created duke, marquis, earl, viscount, baron, or baronet, by letters-patent;(b) and the first case of such a creation was 10th Oct. 11 R. 2; so, the queen may create an Irish peer under the Great Seal of England, but this must be by express words, being a special act of prerogative, for properly what is done under the Great Seal of England relates to England;(c) but, if the queen, by letters of safe conduct, denization, &c. to a noble foreigner, names him by his title, this does not make him a peer of the realm or noble here.(d) Although a man, who is created a baron by writ, must sit in Parliament in order to be noble, yet the case of nobility by letters-patent is different, for by them the creation is perfect, and the blood is ennobled without sitting; and therefore, in Lord Banbury's case,(e) held,

(g) 1 Inst. 16.

(r) 1 Bulstr. 196.

(s) First Lords' Rep. on the Dig. of a Peer, 444 et seq.; Nicholas's *L'Isle Peccage*, 361 et seq. See also 2 Salk. 509; Skinn. 437.

(t) 1 Inst. 16 b.

(u) Ib. See also 12 Co. 70.

(x) 1 Ld. Raym. 13.

(y) Show. P. C. 1.

(z) See 3 Cru. Dig. 138, 4th ed.

(a) 5 B. P. C. 509.

(b) 1 Inst. 16, b.

(c) *R. v. Knollys*, 2 Salk. 510.

(d) Calvin's case, 7 Co. 16 a.

(e) *R. v. Knollys*, 1 Ld. Raym. 10.

that a peerage claimed under letters-patent is not triable by record of Parliament.

603. So, a man may be made noble by Act of Parliament ;(*g*) but, if a noble foreigner be naturalized by Parliament, this will not make him noble here ;(*h*) so, if a duke, baron, &c. of Scotland, (before the Union) or another kingdom, had a son and heir born in England, by which he is natural born, he will not be noble here.(*d*)

604. So, a dignity may be obtained by marriage, as if a duke, marquis, earl, &c. marries, the wife shall be noble for *her life ;(*i*) and if a [**472*] duke, earl, &c., who has the dignity in fee, has not a son, but several daughters, the queen may confer the dignity on him who marries any of the daughters, as she pleases ;(*k*) but in respect to a female there is a difference when she is noble in her own right, and when by marriage, for if noble in her own right, she will still remain so, though she marry a commoner ;(*l*) but if she be noble by marriage only, then by marrying a commoner she loses her dignity.(*l*) If, however, she marries a peer, though her husband be of a lower peerage than herself, yet, according to the letter, she will retain her own dignity ; as, if being a duchess by marriage she marries a baron, yet she continues a duchess ;(*m*) though, in this case, it is said, she shall have precedency only according to the rank of her husband ;(*n*) but it is said, in some of the books, that if a woman noble by birth marry one of inferior nobility, she shall be styled by the dignity of her second husband.(*o*) If a queen dowager takes a husband, noble or not noble, she shall not, by her subsequent marriage, lose her dignity ;(*p*) so, though a woman who is noble in her own right will continue so notwithstanding her marriage with a commoner, yet her dignity communicates no rank or title to her husband,(*q*) see further infra, § 605.

[*473] *III. What Estate may be had in a Dignity, and other Incidents.

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| <p>§ 605. Different Ways of having an Inheritance in a Dignity.</p> <p>606. Distinction between Creation by Writ and Creation by Patent.</p> <p>607. Limitations of Dignities.</p> <p>Entailable.</p> <p>608. When not entailable.</p> <p>Entail not barrable.</p> <p>609. Estate in Remainder.</p> <p>610. Estate for Life.</p> <p>Estate pur autre Vie.</p> | <p>§ 611. Not subject to Curtesy.</p> <p>612. Not subject to Dower.</p> <p>613. Not alienable.</p> <p>Not to be surrendered.</p> <p>Not extinguishable.</p> <p>614. Descent of Dignities.</p> <p>No Possessio Fratris.</p> <p>615. Eldest Sons created Barons.</p> <p>616. Dignities not partible.</p> <p>617. Modes of determining an Abeyance.</p> |
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§ 605. A man (says Lord Coke) may have an inheritance in a title of

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| (<i>g</i>) W. Jo. 10. | (<i>h</i>) Dodd. Nob. 4. | (<i>i</i>) 1 Inst. 16, b. | (<i>k</i>) 12 Co. 111. |
| (<i>l</i>) Dy. 79 ; 1 Inst. 16, b. | | (<i>m</i>) 1 Inst. 16 ; 2 Inst. 50. | |
| (<i>n</i>) Ow. 82 ; but see as to precedency, 4 Inst. 361. | | | |
| (<i>o</i>) See Ow. 82 ; Bendl. 37. | (<i>p</i>) 2 Inst. 50. | | (<i>q</i>) 1 Inst. 326. |

nobility and dignity three manner of ways: by creation, by descent, and by prescription.(*r*) While dignities were annexed to lands, the person seised of the lands had the same estate in the dignity; so, dignities created as well by patent as by writ, have many of the incidents of real property.(*r*)

Dignities created by writ descend to females as well as to males;(s) but, though they are said to be in fee,(*t*) yet it is not strictly so, for a person having a dignity of this kind is not tenant in fee simple of it, so that it should descend to the heirs general, lineal, or collateral of the person last seised; on the contrary, a dignity of this kind is only inheritable by such of his heirs as are lineally descended from the person first summoned to Parliament, and not to any other of his heirs.(*u*)

606. Creation by writ is said to have one advantage over that by patent, that a person, created by writ, holds the dignity to him and his heirs, for the word "heirs" is not *necessary to a creation of nobility by writ, for when a man is called to the upper House of Parliament by writ, he [**474*] is a baron, and hath inheritance therein without this word; yet the queen may, by the writ, limit the general state of inheritance created by the law and custom of the realm;(x) but, if he be created by writ, there must necessarily be the word "heirs," otherwise he has no inheritance.(x)

607. If a dignity be created by letters-patent, the state of inheritance must be limited by apt words, otherwise the grant is void.(y)

A name of dignity may be entailed within the Statute *de Donis*, as dukes, marquisses, earls, viscounts, barons, because they were originally named of some county, manor, town, or place, (see ante, § 600,) and consequently concerned land;(z) thus it was resolved, that when Ralph Nevil was by letters created Earl of Westmoreland to him and the heirs male of his body, an estate tail was thereby raised, and not a fee conditional at common law;(a) so, a dignity may not only be entailed at its first creation, but also a dignity, originally descendible to heirs general, may be entailed by an Act of Parliament upon the heirs male of the person seised thereof,(b) therefore, in a dispute, after the death of Henry de Vere, Earl of Oxford, respecting the right to that earldom, between Robert de Vere, claiming under the entail, created by the 16 R. 2, as heir male of the body of Aubrey de Vere, and Lord Willoughby de Eresby, claiming as heir general, the judges, whose assistance was called in by the House of Lords, that is, the Lord Chief Justice Crew, Ld. Chief Baron Walter, Doddridge and Yelverton, Justices, and Baron Trevor, were unanimously of opinion, "that, although the earldom of Oxford was originally held in fee simple by the family of De Vere, yet that the honour of the said earldom of Oxford was entailed upon Aubrey de Vere and his heirs male by the Parliament of 16 R. 2, *and that an estate [**475*] therein was sufficiently raised and created thereby, and was so reputed and enjoyed by many descents of the earls, which could not have been (as the same was limited) if the same had only been an ordinance of

(*r*) 1 Inst. 16, a. See also Countess of Rutland's case, 6 Co. 52, 53; The Prince's case 8 Co. 17; 4 Inst. 126.

(*s*) Skinn. 436 et seq.

(*t*) 1 Inst. 6.

(*u*) Id. 16, b; 1 Wood. 37.

(*x*) Lord Vesey's case, 27 H. 6, cited 1 Inst. 9, b.

(*y*) 1 Inst. 16, b.

(*z*) Id. 20, a.

(*a*) Nevil's case, 7 Co. 33.

(*b*) Coll. Claims Peer. 173.

Parliament; that, therefore, the said honour descended, and then of right belonged to Robert De Vere as heir male of the said Aubrey, by virtue of the entail.”(e)

608. It was resolved, Pasch. 9 Jac. 1, if the king did not create a man of some place, he should not have an estate tail, but a fee simple conditional, which should be forfeited for felony, but if he created him a baronet of some place, then he should have an estate tail within the Statute *de Donis*.(d) But, though dignities and titles are thus entailed as tenements within the statute, yet neither the donee nor his issue could bar the entail, by fine or recovery, before the 3 & 4 W. 4, c. 74, (see Dig. P. ii. tit. Fines and Recoveries,) nor by any other means, as might or may now be done under that Act in the case of other entailable things.(e)

609. An estate in a dignity may also be limited to a person in remainder, after the determination of an estate tail; thus the earldom of Northumberland was granted to Thomas Percy and the heirs male of his body, and for default of such issue, to Henry his brother, and the heirs male of his body.(f)

610. So, the queen may create either man or woman noble for life,(g) but not, it is said, for years, because then it might go to executors and administrators.(h)

Whether a dignity may be granted *pur autre vie* is not so settled. In an early case it is intimated that a man may be *noble during the [*476] life of another;(i) and Mr. Justice Dodderidge, in his Treatise on Dignities, observes, that the king may grant peerages *pur autre vie*, “as (however, he adds by way of qualification) it has been said.” In a late case(k) it is observed, “that the Crown may grant a peerage for life, not only of the grantee, but also *pur autre vie*. The most common way of doing this is by a grant to the son during the life of the father, by calling the son by another title to this house, such a title will enure during the father’s life, and on his death the succession will operate by way of merger, so that the two will become but one dignity. (See ante, § 601). “But although this is the common and usual way, it is not the only way in which such a title may be granted. The *cestui que vie* may be the ancestor or not, and then observe, my lords, what is the consequence of this singular reservation; a man does not know in one day whether he shall be noble or commoner the next;”(l) so in the same case it was said, “Is the blood of a man to be ennobled only for a time? I say no, for being once ennobled, it must be so till crime has worked a forfeiture of his nobility.”(m)

611. It seems also doubtful, whether a dignity is subject to curtesy. While dignities were annexed to castles, manors, &c., the husband of a wo-

(c) Coll. Claims Peer. 173. See also W. Jo. 96.

(d) 12 Co. 81.

(e) Lord Purbeck’s case, Show. P. C. 1; Coll. Claims, 293.

(f) Nevil’s case, 7 Co. 33.

(g) Reynel’s case, 9 Co. 97.

(h) 1 Inst. 16, b; but see cont., Dodd. Nob. 401.

(i) 52 H. 6, 29.

(k) Earl of Devon’s case, 2 Dow & Clark, 203.

(l) Per Lord Brougham, C., Ib.

(m) Per Lord Wynford, Ib.

man possessed of such castles, &c., was bound, among other services due to the Crown, to attend in Parliament, and, consequently, enjoyed the dignity during the joint lives of himself and his wife, of which some early examples are cited by Mr. Cruise, 3 Dig. 150, 4th ed.; but in the time of Lord Coke this point was much discussed, and by him is left doubtful;(n) but the better opinion in modern times is that there is no curtesy in titles of honour.(o)

*612. So, a woman shall not be endowed of a family mansion, which is a *caput baroniæ* or the capital mansion;(p) but this is to [*477] be understood as applicable only to baronies by tenure, of which it is said that there is only one now remaining, namely, the barony of Arundel, and, therefore, creating a person baron by a title taken from a principal mansion house in his possession will not make the house *caput baroniæ*, so as to exclude the wife from dower.(q)

613. Dignities by tenure appear to have been formerly alienable, provided such alienation was made with the consent of the Crown;(r) but when dignities ceased to be annexed to the possessions of land, and came to be considered as personal inheritances, the right of alienation ceased, and it became a settled rule that a dignity was an hereditament, inherent in the blood of the first grantee, and his descendants, and was therefore unalienable;(s) therefore, in the case of an entail they cannot be barred.(t)

So, not surrendered to the Crown;(t) so, it seems to be now settled, that it will not be extinguished by the acceptance of a new title, "for the greater dignity doth never drown the lesser dignity, but both stand together in one person, and therefore, if a knight be created a baron, yet he remaineth a knight still; and if the baron be created an earl, yet the dignity of a baron remains, *et sic de cæteris*;"(u) although this point was doubted in Lord Delaware's case,(x) yet it was settled in the case of the barony of Willoughby de Broke;(y) so, where a person having a barony by writ is made an earl, held, contrary to a former supposition, that the earldom will not attract the barony, but at his death, leaving a daughter only and a younger *brother, the barony would descend to the daughter, and [*478] the earldom to the younger brother;(z) so, if the earldom becomes extinct, the barony will descend to the heir.(a)

614. The descent of dignities by tenure was guided by the same rules as regulated the descent of the castles and manors, &c., to which they were annexed, as to which see post, TITLE TO THINGS REAL.

The descent of dignities created by writ differs from the descent of lands, inasmuch as there can be no other possession had thereof but such as

(n) 1 Inst. 29, b.

(o) Harg. Co. Litt. 29, b, n. (1).

(p) 1 Inst. 31. b.

(q) Gerard v. Gerard, 1 Ld. Raym. 72; S. C., 5 Mod. 64; 3 Lev. 401.

(r) 4 Inst. 126; Ryl. Plact. Parl. 547.

(s) 3rd. Rep. on the Dig of a Peer, p. 17. See Journ., vol. 4, p. 150; also 3 Cruise, Dig. 153, 4th ed.

(t) Purbeck's case, Show. P. C. 1; Coll. Claims, 293.

(u) 2 Inst. 594.

(x) 11 Co. 1; Coll. Claims, 122.

(y) Coll. Claims, 321.

(z) Coll. 162.

(a) Id. 286.

descends (as to be a duke, marquis, earl, viscount, or baron) to a man and his heirs; therefore, before the 3 & 4 W. 4, c. 27, (abolishing this distinction,) there could be no *possessio fratris* of a dignity to make the sister inherit, but the younger brother being heir to his father should inherit the dignity, inherent to the blood, as heir to him that was first created noble.(b)

615. Where baronies are created by writ of summons to the eldest sons of peers, by the name of baronies vested in their fathers, (see ante, § 601,) they are held to be hereditary in the blood of the persons so summoned, and descendible to their heirs; therefore, if the son dies in the lifetime of his father, the dignity will descend to his son;(c) but if the father has only an estate tail in the barony, the estate of the son, though summoned by writ, is not enlarged, nor made a fee, descendible to heirs in general; therefore, where the eldest son was summoned by writ in the name of a barony not vested in his father, it has been determined that his son could not establish his claim to be summoned by writ.(c)

616. As dignities are of an impartible nature, when any dignity descends [479] to coheirs, it falls into suspense or abeyance.(d) *This abeyance may be determined two ways: first, by the Crown, the fountain of honour and dignity, conferring it on whom the sovereign pleases; secondly, by the death of all the coheirs but one. A remarkable instance of the exercise of the prerogative in reviving titles after an abeyance, took place in the person of Mr. Norborn Berkley, who was called to the House of Peers in right of the old barony of Botetourt, after an abeyance of several centuries, and was allowed to sit according to the antiquity of that barony;(e) and it has been decided that the queen may dispose of the dignity to either one of the coheirs at her pleasure, but not to a stranger;(f) so, it has been held, that it is in her Majesty's power to suspend the dignity, but not to extinguish the same.(g) As to the second case, where there is but one coheir, it has been decided that the attainder of one of the coheirs for high treason did not terminate the abeyance, and give the other a right to the barony.(g)

617. When the abeyance of a barony is terminated in favour of a commoner, a writ of summons is directed to be issued to him by the style and title of the barony which is in abeyance; but where the person in whose favour an abeyance is determined is already a peer, and has a higher dignity, then the barony is confirmed to him by letters-patent, and in the case of a female, the abeyance is also terminated by letters-patent.(h)

Formerly it was the practice to confirm the barony to the coheirs and his or her heirs, but now it is more properly confirmed to the heirs of his or

(b) 1 Inst. 15, b.; Lord Grey's case, Cro. Car. 60, recognizing Ratcliff's case, 3 Co. 42.

(c) Barony of Sydney, printed case, 1782. See also the L'Isle Peerage case, p. 14.

(d) F. N. B. tit. Partition, 1 Inst. 165, a.; 2 Dugd. Bar. 363.

(e) Cas. in Dom. Proc. for 1764. See further, Harg. Co. Litt. 165, a., n. (6); 2 Dugd. Bar. 363; Journ., vol. 15, p. 442 et seq.

(f) Barony of Willoughby de Broke, Coll. 322.

(g) Barony of Clifford, Coll. 306.

(h) 3 Cruise, 192, 4th ed.

her body, for no one can be heir of the body of the person in whose favour the abeyance is determined, without being also lineally descended from the person first summoned. *(h)*

*IV. *How lost or recovered.*

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| <p>§ 618. Forfeited by Attainder for Treason.
By Attainder for Felony.
619. Corruption of Blood.
620. Honour taken away for Poverty.</p> | <p>620. By what other Modes a Dignity may be lost, or otherwise.
621. Restoration of Blood.
622. Disputed claims, how tried.
By Record.
622. By a Jury.</p> |
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§ 618. A peer cannot be degraded but by attainder or by Act of Parliament; a peerage may, however, be lost for want of heirs, but a peer cannot divest himself of his honour. *(i)*

Dignities of every kind are forfeited by attainder for treason, and can be revived only by a reversal of the attainder, but where a person was tenant in tail of a dignity, remainder in tail to another, and the first tenant in tail was attainted of high treason, the dignity was held forfeited as to him and his descendants, but not as to him in remainder; *(k)* so, a dignity created by writ, and descendible to heirs in general, is also forfeited by attainder for felony of the person possessed of it, for, in the words of Lord Coke, "If he was noble or gentle before, he, and all his posterity, are by the attainder made ignoble; *(l)* but dignities in tail are not forfeited by attainder for felony, except during the life of the person attainted, for the 26 H. 8, c. 13, which subjects estates tail to forfeiture for high treason, does not extend to attainders for felony, as in the case of Lord Stourton, *(m)* and again in Earl Ferrer's case. *(n)*

619. The blood of a person attainted being corrupted, no pedigree can be derived through him; *(o)* therefore, where a *dignity descends to heirs general, the attainder for treason or felony of any ancestor of [*481] a person claiming such dignity, though the person attainted was never possessed of the dignity, will bar his claim, for the blood of the person being corrupted, no pedigree can be derived through him; *(p)* and so decided in the case of the Barony of Lumley; *(q)* but this does not extend to entailed dignities, therefore, a dignity may be claimed by a son surviving an attainted father, who never possessed the dignity; *(r)* for the son may claim from the first grantee *per formam doni*, *(s)* and so it has since been decided; *(t)* but

(h) 3 Cruise, 192, 4th ed.

(i) R. v. Knowles, 12 Mood. 56. *(k)* Nevill's case, 7 Co. 33 a.; 2 Coll. Peer, 321.

(l) 1 Inst. 41.

(m) Journ., vol. 1, p. 731.

(n) Eden, Rep. Append.

(o) 1 Inst. 391.

(p) Lumley's case, 2 Hale, P. C. 356.

(q) Cited, 3 Cruise, 159, 4th ed.

(r) Lord Lumley's case, cited 3 Co. 10; 2 Hale, P. C. 356.

(s) Digby's case, 8 Co. 166 a. *(t)* Duke of Athol's case, Lords' Journ., vol. 30.

where the person attainted survives the ancestor who possessed the dignity, it has been decided that the dignity reverted to the Crown, and could not be claimed by any collateral relative of the person.(u)

620. As every one of the nobility is presumed in law to have sufficient freehold *ad sustinendum nomen et onus*, if one that is noble want possessions to maintain his estate, it has been held reason sufficient to degrade him, as in the case of George Nevill, Duke of Bedford, who was degraded by act of Parliament;(x) but a dignity can be taken away by Act of Parliament only,(y) it cannot be taken away by order of the lords in Parliament;(z) so, a dignity or nobility cannot be extinguished except by Act of Parliament, if it be not forfeited,(a) or unless lost by marriage, as in the case of a woman, see ante, § 904.

So, a dignity will not be extinguished by acceptance of another dignity, (see ante, § 613;) so, a dignity shall not be lost, as in the case of lands, by [*482] non-claim, before the 3 & 4 W. *4, c. 27, (see Dig. P. iii. tit. Limitations,) for the statutes of limitation did not extend to it;(b) so, not even in case of adverse possession by persons not entitled.(c)

621. In cases of attainder for treason or felony, the corruption of blood can be restored by Parliament only. Restitution may be either as to the corruption of blood only, or it may be a general restitution not only to blood, but also to lands and honours.(d) When a person is outlawed for treason or felony the blood is also corrupted, but may be restored either by Act of Parliament, reversal of the outlawry, or writ of error. Formerly a writ of error to reverse an outlawry in a criminal matter was held to be merely *ex gratiâ regis*, and not grantable *ex debito justitiæ*;(e) afterwards it was held to be grantable as matter of right in all cases under treason and felony,(f) but now it cannot issue without a *fiat* from the Attorney-General.(g)

622. If there be a dispute whether a man be a peer or no, it shall be tried by record of Parliament,(h) for generally all matters of record shall be tried by the record itself;(i) but this applies properly to baronies by writ, and where the baron has taken his seat, (see ante, § 601,) for unless he has taken his seat it cannot appear by record;(j) but it is different with baronies by patent, for by them the creation is perfect and the blood is ennobled without sitting; therefore, it has been held that a peerage claimed under letters-patent is not triable by the record of Parliament, but must be questioned by pleading *non concessit*;(k) and where a man claims by descent, though he ought to produce the patent of creation, yet being a matter of fact [*483] *whether A. is the son of B. or no, it is triable *per pais*, in the same manner as countess or no countess, where one is a countess by marriage.(l)

(u) Airlie earldom, printed case, 1812. See further 3 Cruise, 159 et seq., 4th ed.

(x) 12 Co. 107; 4 Inst. 355; Rot. Parl. vol. 6, p. 173.

(y) Earl of Shrewsbury's case, 12 Co. 108 b. (z) 2 Salk. 511. (a) Skinn. 437.

(b) Skinn. 437.

(c) Barony of Willoughby of Parham, Lords' Journ., vol. 31, p. 358; 3 Cruise, 184, 4th ed. (d) 3 Inst., c. 106; Hale, P. C., c. 27.

(e) 1 Vern. 170; 2 Burr. 25, 50. (f) Salk. 264. (g) 4 Burr. 2551.

(h) 1 Inst. 16 b.

(i) 9 Co. 31 a.

(j) 1 Inst. 16 b.

(k) R. v. Knolleys, 1 Id. Raym. 10.

(l) Skinn. 520. See also the Countess of Rutland's case, 6 Co. 33.

If any one becomes heir to a barony and be not summoned to Parliament, he may sue to the queen by petition of right, and thereupon it will be referred to the Lords.^(m)

As to determining an abeyance, see ante, § 617.

SECTION XIII.

FRANCHISES.

§ 623. A franchise is another species of incorporeal hereditament, which may be considered under the following heads:—

1. The nature of a franchise, and its different kinds.
2. How claimed.
3. How lost or destroyed.

I. Nature of a Franchise, and the different Kinds.

§ 623. Definition of a Franchise.

| § 623. Different Kinds.

§ 623. A franchise, sometimes called a liberty, is a “royal privilege, or a branch of the queen’s prerogative, subsisting in the hands of a subject.”⁽ⁿ⁾ Of franchises there are divers kinds, which being more or less connected with land, are here entitled to notice.

*I. To have a Forest, Chace, or Warren.

[*484]

§ 624. What is a Forest.

625. What is the Purlieu of the Forest.

626. Nuisances, &c. in the Forest.

§ 627. What Wood esteemed Vert.

Who may cut Wood.

628. Land Revenue of the Crown.

629. Chace and Warren.

§ 624. A forest is a circuit of ground properly under the queen’s protection, for the peaceable living and abiding of beasts of venery and chace, and distinguished not only by having bounds and privileges, but also by having courts and offices;^(o) but it is not proved to be a forest by being called a forest in records &c.^(o) A forest may be in the hands of a subject, for it may be granted by the sovereign, subject to the forest laws, as it was in the case of the Dukes of Norfolk and Lancaster, who had forests so subject to the forest laws;^(p) but if the jurisdiction be not added in the grant, it

^(m) W. Jo. 97.

⁽ⁿ⁾ 2 Comm. 37.

^(o) Case of Leicester Forest, 12 Co. 22.

^(p) Manw. For. Laws. 40; 4 Inst. 314.

becomes only a chace, and trespassers were punishable formerly at common law, *(q)* but now under the provisions of the 1 & 2 W. 4, c. 32, see Dig. P. iii. tit. Game. If a forest be parcel of a manor, by the grant of the manor *cum pertinentiis*, to a subject, the forest does not pass. *(r)*

625. In the time of H. 2, R. 1, and John, many lands adjoining to the king's forests were incroached within the forest, which by *Charta de Foresta*, made 17 John, and confirmed 9 Hen. 3, were to be disafforested, and afterwards by perambulations made in the time of Ed. 1, and Ed. 3, were disafforested, and the lands so disafforested are named the purlieu or *pourallée*, that is, the part perambulated. *(s)* Therefore, the purlieu of a forest is land adjoining to a forest, *known by meers immovable upon record, which was [*485] within the forest, but is now disafforested; *(t)* and the purlieu is exempt from the forest, for it is *infra metas*, *(u)* and the owner may cut down his wood, plough and improve his land, without license, for the purlieu was disafforested only for the benefit of the owners, and as to others it remains; *(x)* so, the owner of the land or wood within a purlieu may hunt with dogs beasts of the forest found in his soil, and he may kill them before they pass the limit; *(y)* so, if a dog fasten upon a deer before she gains *filum forestæ*, and she drags the dog into the forest and is there killed, the owner may pursue, and take the deer out of the forest; *(y)* but a man who has land within a purlieu cannot by gun or engine forestal the beasts of the forest in their return to the forest; *(z)* so he cannot kill unseasonable game within the purlieu; *(z)* so, not in the fence-month. *(z)*

626. Anything which will be a nuisance by law, if done out of the forest, will, if done within it, be a nuisance, as to erect a cottage there without a license, although built for the poor; *(a)* so, inclosing within the forest; *(a)* so, setting up a ferry where there was none before; *(b)* so, carrying a gun to kill deer; *(c)* so, burning heath, &c., within the forest; *(d)* so, building a wall whereby the highway is straightened; *(e)* so, if beasts damage the wood of B. within a forest, though B. ought to maintain the fence; so, erecting a windmill within the forest, though it be upon his own soil; *(f)* so, if a man by building, inclosure, or using any liberty or privilege, incroach upon the rights of the forest, it will be purpresture and an offence to the forest; *(g)* so, every offence which tends to the destruction of the forest, or [*486] the vert or venison of the forest, or is *a breach of the laws of the forest, will be a nuisance to the forest; *(h)* and therefore, not only the hunting or killing the beasts of the forest which destroys the venison, and waste, purpresture, or apart, which destroys the vert, but any thing which tends to such destruction will be a nuisance to the forest. *(i)*

627. All wood and underwood in the forest is esteemed vert, and if any cut the vert of the forest within his own land without license, it is waste; *(k)* therefore, a man cannot cut wood in his own land within the forest, or

(q) 4 Inst. 314; Cro. Jac. 155; Palm. 89, 90.

(r) Case of quo Warranto, Palm. 60.

(u) Id. 87.

(a) W. Jo. 269.

(e) Id. 277.

(h) Manw. 266.

(x) Id. 366.

(b) Id. 274.

(f) Id. 293.

(i) Id. 267.

(s) Manw. 317 et seq.

(y) Id. 371.

(c) Id. 275.

(g) 1 Inst. 277, b.

(k) Id. 147.

(t) Manw. 318.

(z) Id. 384.

(d) Id. 276.

destroy the coverts, without a view of the forester, and license of the justices in Eyre, (now by 10 G. 4, c. 50, the Commissioners of the Woods and Forests,) though it escheated to the queen, and he then held it by the queen's patent, for the patentee shall be subject to the forest laws; *(l)* but, in a forest and chase in the hands of a common person, the owner of the soil may cut his wood without the license or view of the forester, if sufficient vert be left; *(m)* so, by prescription, a man may cut timber in his own wood within the forest without the view of the forester, *(n)* so far at least as regards a forest, though allowed in respect of a chase; so, an officer, as it seems, may prescribe to have so much wood to be assigned by the woodward within the forest for his fuel. *(o)*

If the cutting of vert or covert within a forest be waste, the destruction of it will be still more so; and therefore, if a man cut his wood by license within the forest, and afterwards do not inclose the wood with a sufficient fence, whereby it be destroyed by beasts, the destruction of the wood will be waste; *(p)* so, if he assart, that is, eradicate, his woods, and convert his land to tillage, that will be more heinous waste; *(q)* and, if he convert meadow or pasture within a forest surrounded with coverts, to arable, [*487] it will be an apart; *(r)* so, a grant to be quit of assarts, shall be only for those before committed. *(s)*

628. If a man commit waste within a forest by cutting or destroying the vert without license, the wood or the land where the waste is done shall be seized into the hands of the queen, till the owner replevy it and make fine, *(t)* though the owner has an estate of inheritance, *(t)* and though he die before presentment of the waste, for the wood or other land shall be seized until the heir replevy it, *(t)* and if the heir will not pay the fine the land remains in the queen's hands forever. *(t)* The old forest law is in most other respects now grown out of use, and what remains of it is now administered by the Commissioners of her Majesty's Woods and Forests, aided by the verderers and some other of the old officers. By the 10 G. 4, c. 50, it is provided, that all honours, hundreds, lordships, manors, forests, chaces, woods, parks, messuages, lands, tithes, fisheries, franchises, services, rents, and other land revenues, possessions, tenements, and hereditaments, belonging to her Majesty, (except advowsons and vicarages,) shall be under the management of her Majesty's Commissioners of Woods and Forests; so, by the Game Act, 1 & 2 W. 4, c. 32, provision is made for the punishment of persons trespassing in any of her Majesty's forests, parks, chases, or warrens. See further, Dig. p. i. tit. Land Revenue of the Crown; p. iii. tit. Game; as to common in a forest, see ante, § 305 et seq.

629. A chase is a liberty to keep certain wild animal within a certain district, and an exclusive right of hunting them therein. A chase is distinguished from a forest by not being subject to the forest laws, and

(l) Id. 136.

(m) The case of Leicester Forest, Cro. Jac. 155; S. C., 12 Co. 22.

(n) Manw. 82, 135; dub., W. Jo. 290. 275; and contra, W. Jo. 290.

(o) Sav. 5.

(q) Manw. 155; 4 Inst. 306, 307.

(s) W. Jo. 271. 289.

(p) Manw. 149.

(r) Manw. 157.

(t) Manw. 151. 158.

although a place be inclosed and proclaimed as a forest, yet it shall be a [*488] chace till the proper officers and courts are granted; (u) but no one can make a chace within his own land or elsewhere, without the queen's grant; (x) the like may be said of an ancient park; and as to the distinction between a chace and a park, see further, Dig. iii. tit. Game.

Free warren is also a privilege to have beasts of a warren in one's land, and the exclusive right of killing and hunting them therein. (y) This privilege is distinct from the land, and by a lease of the land, without more, the warren will not pass; (z) so, not by an alienation of the land without saying *cum pertinentiis*; (z) but it has been usual in such cases for the alienor to reserve the privilege to himself, (a) hence it has come to pass, that a man may have a free warren in another man's land; (b) so, it is said, "that a man may have a free chace as belonging to his manor in his own wood, as well as a warren or park in his own grounds; for the chace, warren, or park are collateral inheritances, and not issuing out of the soil, as the common doth, and therefore if a man hath a chace in other men's grounds, and after purchase the grounds, the chace remaineth;" (c) so, a free warren may be claimed within a chace of the queen, (d) and the grantee may there build a lodge upon his own inheritance; (e) so, it may be claimed in a royal forest, (f) but it must have been allowed in the Eyre before the abolition of that court, (g) see Dig. p. i. tit. Land Revenue of the Crown; and it may be claimed by grant or prescription; (h) but if prescribed for it must be in the ancient place, (i) and a prescription is not lost by non-user; (i) but a man cannot prescribe for a warren in the lands of a stranger which are not within his seignior; (j) so, none can make a warren in his [*489] own land without a license from the Crown, because he cannot appropriate to himself *feras naturæ*, which are *nullius in bonis*; (k) and if the queen grants to B. a warren within his manor, he shall have it only in the demesnes, not in the lands of the freeholders. (l)

A free fishery, like a free warren, is a privilege under a grant from the Crown, to have the exclusive right of taking and killing of fish in an arm of the sea, or a navigable river, *Carter v. Murcot*; (m) but, in this case it was held, that if any one would claim such privilege, he ought to shew a right, the presumption being against him. (n)

II. To be a County Palatine.

§ 630. The highest franchise was to be a county palatine, which was so called because the count palatine had *jura regalia* within his county as the

(u) Manw. 60.

(x) Id. 56; 2 Inst. 199.

(y) 2 Roll. Abr. 812.

(z) Dy. 39, in marg.

(a) 2 Roll. Abr. 812.

(b) 2 Comm. 39, citing Bro. Abr. tit. Warren, 3.

(c) 4 Inst. 318.

(d) Id. 498.

(e) Id. 298.

(f) Manw. 81; Cro. Jac. 155.

(g) Harrison's case, W. Jo. 230.

(h) 2 Roll. Abr. 812.

(i) Cro. Jac. 155.

(j) 2 Roll. Abr. 265.

(k) 2 Inst. 199.

(l) Burrough v. Taylor, Cro. El. 463.

(m) 4 Burr. 2164.

(n) Ib. See also the River Bann's case, Dav. 55.

king himself,(o) and the county was made palatine à *palatio regis*, not the person a count palatine; and the authority of him who had a county palatine was as full as that of the king himself, within his county,(p) and consisted of a royal seignior and a royal jurisdiction.(q) There were formerly four such counties palatine, namely, Lancaster, Chester, Durham, and Ely, but the separate jurisdiction in all of them is either abolished altogether, or made to be subordinate to that of the courts at Westminster. See Dig. P. i. tit. Lancaster, Chester, Durham, and Ely.

*III. To have a Manor.

[*490]

§ 631. Manorial Rights.

Court-baron.

Suitors to the Court.

632. Jurisdiction of a Court-baron.

633. Where and when the Court is to be kept.

Method of holding Courts.

§ 633. Charge to the Inquest.

634. Attachment.

Execution.

635. Customary Court.

636. Other Franchises annexed to Manors.

§ 631. A manor, as before shewn, (see ante, § 88), is a certain circuit or district originally assigned to great men, to which certain manorial rights or privileges were annexed. One of the most important rights belonging to this franchise is that of holding courts, namely, a court-baron and a customary court.

To every manor a court-baron is incident,(r) and therefore in a *quo warranto* for holding a court-baron, it is sufficient to plead that he has a manor;(s) and if he pleads that he has a manor, he ought not to prescribe for holding a court-baron;(t) so, if he grants a manor, the court-baron passes as incident, although there is an exception of all courts, unless in the case of the queen;(u) but the profits of courts may be excepted;(x) and being incident to a manor of common right, it is not lost, merely because no court has time out of mind been holden within the manor.(y)

Freehold tenants alone are suitors to the court-baron, and of these there must be two at least;(z) and in *Glover v. Lane*,(a) it is said, "To constitute a manor, it is necessary *not only that there should be two freeholders within the manor, but also two freeholders holding of the [*491] manor subject to escheats."(b)

(o) 4 Inst. 204; Dav. 60.

(p) 4 Inst. 205.

(q) Dav. 62.

(r) 8 H. 7; 1 Kitch. 7, 8; 1 Inst. 58; 2 Inst. 99; 4 Inst. 268.

(s) *R. v. Stanton*, Cro. Jac. 260. See also 1 Bulstr. 51; *R. v. Staverton*, Yelv. 190; Noy, 20; Moor, 870; 1 Bl. 580.

(t) Noy, 20.

(u) *Brown v. Goldsmith*, 8 J. B. Moore, 870.(x) *Sir Robert Acton's case*, Dy. 288.(y) Ow. 35. See also *R. v. Havering-atte-Bower*, 5 B. & A. 691; *R. v. Hastings* (Mayor, &c.,) Id. 692, n.(z) Bro. tit. Court-baron, pl. 23; Kitch. 7, 8; *R. v. Staverton*, sup.; *Tomkin v. Crocker*, 2 Ld. Raym. 864; 1 Watk. Cop. 9; 2 Scriv. Cop. 720. (a) 3 T. R. 447.(b) Per Lord Kenyon, *Glover v. Lane*, 3 T. R. 447. See also *Chetwode v. Crew*, Willes, 614.

The suitors are the judges of the court, not the steward,(c) unless there be a custom or prescription that pleas should be holden before the steward, which it seems there may be;(d) although in some earlier cases this was denied.(e) The steward, is however, a constituent part of the court, and not merely a ministerial officer, as was formerly supposed.(f)

632. Courts baron were ordained for three purposes, namely, to adjust differences between lord and lord, between lord and tenant, and between tenant and tenant;(g) and it is said also as against strangers coming within the manor.(h)

A court-baron may hold plea of actions personal when the debt or damage is under 40s.:(i) so, in trespass without *vi et armis*, under 40s.:(k) but by charter or prescription, it may hold pleas above 40s.(l)

But account does not lie in a court-baron;(m) so, not regularly trespass *vi et armis*;(n) so, not detinue of writings;(o) *sed secus* as to detinue of goods;(p) so not replevin.(p)

A court-baron, it seems, may also hold pleas of land, to the exclusion of all other jurisdictions, except by a *remisit curiam* from the lord;(q) and this was by a writ of right patent before its abolition by the 3 & 4 W. 4, c. 27. Such a plea may be removed by writ of toll into the county court, and from thence into the Court of Common Pleas.(r)

A court by prescription may also have jurisdiction, as a peculiar, to grant probate and administration, and also to take cognizance of testamentary causes.(s)

If an action be sued in a court-baron, in which it has no jurisdiction, prohibition lies;(t) so, if the defendant pleads that the cause did not arise within the jurisdiction;(t) so, if it has no jurisdiction, the proceeding there is void, and trespass lies.(t)

633. A court-baron may be held at any place within the manor, otherwise it will be void;(u) but by custom the lord may hold a court within one manor for several manors;(v) so, a surrender may be made out of court

(c) 39 H. 6. 5, cited Bro. tit. Judgment, pl. 118; Kitch. 145. See also Gentleman's case, 6 Co. 11 b; Lord Cobham and Browne's case, 1 Leon. 217; Lovell and Galston's case, Godb. 68; Eure v. Wells, T. Jo. 23; R. v. Morgan, 1 Bl. 398.

(d) 1 Leon. 316, pl. 441; Tonkin or Tomkin v. Crocker, 2 Ld. Raym. 860; S. C., 2 Salk. 604; S. C., 2 Lutw. 1211; R. v. Morgan, 1 Bl. 398. See also Rast. Ent. 553; Co. Ent. 118; Winch's Ent. 1014; James v. Tutney, Cro. Car. 497; Eure v. Wells, T. Jo. 23.

(e) Pell v. Towers, 2 Cro. El. 791; S. C. nom. Pell v. Towers, Noy, 20; Armyn v. Appletoft, Cro. Jac. 582. See also 2 D'Anvers, 295, tit. Court-baron; 1 Nels. Abr. 50.

(f) Howard v. Wood, 1 Freem. 473; S. C., T. Jo. 126; S. C., 2 Lev. 245. See contra, Calth. 54; Holroyd v. Breare, 2 B. & A. 473. And see further 2 Scriv. Cop. 722, 3rd ed.

(g) Scrog. Pract., pp. 82 et seq.

(h) Br. Court-baron, pl. 1; Kitch. 146.

(i) Kitch. 74; Pell v. Towers, sup.

(k) Kitch. 146.

(l) Id. 187. See also R. v. Havering-atte-Bower (Steward, &c.), 5 B. & A. 69; and R. v. Hastings (Mayor, &c.), Id. 692.

(m) Kitch. 146, citing 43 E. 19.

(n) Kitch. 146 et seq.; 1 Inst. 118; 2 Inst. 311.

(o) F. N. B. 47. (p) Kitch. 146.

(q) Id. 147.

(r) Booth's Real Actions, 86, n.

(s) Denham v. Stephenson, 1 Salk. 41; Atkins v. Hill, Cowp. 286.

(t) Kitch. 147; F. N. B. 4, E.

(u) 1 Inst. 58; Kitch. 186; Co. Cop., s. 31; Scrog. Pract. 83.

(v) Ib. See also Seagood v. Hone, Cro. Car. 367; S. C., W. Jo. 342; Co. Cop., s. 31; Clifton v. Molyneux, 4 Co. 27.

without alleging a special custom for it; (*x*) so, a steward may take surrenders out of a manor without a custom. (*y*)

The court-baron was formerly held once in every three weeks, (*z*) but it is now usually held once a year, and the lord, in the absence of any custom, cannot compel a more frequent attendance of the suitors; (*a*) and it is said that it might be held even at night. (*b*) But special courts may *also be called for the purpose of effecting the transfer of copyhold property. [*493]

The usual method of holding a court-baron is, that the steward makes a precept to give reasonable warning of the court. (*c*) Warning for fifteen days is best, which is the common time between the *teste* and return of a writ in the Common Pleas, (*c*) but six or seven days' warning is sufficient. (*c*)

After the inquest and the proclamation, the steward gives the charge to the inquest. (*d*) The charge admonishes them to present suitors who make default; (*e*) so, to present the death of every tenant, and who is heir, and what profit accrues to the lord by his death; (*f*) forfeiture of any tenant by alienation, &c.; (*f*) so, subtraction of services; (*f*) so, incroachment or trespass in his demesne, or waste; (*f*) so, inclosure or surcharge, &c. of common, (*f*)

All pleas in a court-baron of common right and of a personal nature were by wager of law, before the 3 & 4 W. 4, c. 2, s. 13, abolishing that proceeding, and it was only by prescription that it could be determined by the jury. (*g*)

634. The process on plaint in a court-baron is summons and distress infinite; (*h*) but the court has no power to make execution as in the superior courts; (*i*) and the distress in a court-baron, even of goods taken upon a judgment, is only in the nature of a pledge, and cannot be sold except by special custom; (*k*) yet, by special custom, a *levari facias* may be awarded in a court-baron, and the goods may be sold, but in such case the custom must be pleaded. (*l*)

*A court-baron not being a court of record, neither the lord nor steward can fine or imprison, (*m*) nor can the lord or steward assess an amercement for a private trespass done to the lord, except by custom; (*n*) yet by prescription, the steward, even of a court-baron, may assess an amercement, (*o*) see further as to amercements, post, § 652.

635. So, a manor has a customary court, as well as a court-baron, (*p*) and this concerns the copyhold tenants only, (*p*) and it may be held without freeholders, although it is otherwise with a court-baron, (see ante, § 631,) and

(*x*) 1 Inst. 59.

(*y*) *Dudfield v. Andrews*, 1 Salk. 184. See also *Tuckeley v. Hawkins*, 1 Ld. Rayn. 76.

(*z*) Co. Cop., s. 31. (*a*) *Scroggs*, 40. 83. (*b*) *Moor*, 6S, pl. 185.

(*c*) *Kitch*. 6 a. (*d*) *Id.* 7. (*e*) *Id.* 53. (*f*) *Id.* 55.

(*g*) *Tyndal v. Toller*, Bendl. 140; S. C., 1 Leon. 204; S. C., cited *Moor*, 277.

(*h*) 38 E. 3, 3, cited Bro. Court-baron, pl. 5, 10; *Tubervill v. Tipper*, 2 Roll. Rep. 493.

(*i*) 4 H. 6, 17, cited Bro. Court-baron, pl. 6, 7.

(*k*) Bro. Court-baron, pl. 6, 7; *Id.* Execution, pl. 110. But see *Scroggs*, Pract. 93.

(*l*) *Frye v. Burgh*, Noy, 17; *Pell v. Towers*, *Id.* 20; *Hewett v. Norberon*, Bulstr. 52. See also *Scroggs*, 203. (*m*) Co. Cop., s. 26; Tr. 34. (*n*) *Kitch*. 154.

(*o*) *Blunt v. Whitacre*, 1 Leon. 242.

(*p*) 1 Inst. 53.

although there should be no freeholder in the manor by which the court-baron could be held, and even the manor itself is, in some respects, lost, yet there still may be a customary court; (*q*) so, therefore, where a manor is granted by copy, it may have a customary court, but it shall not have a court-baron; (*r*) but there cannot be a customary court without copyholders, (*s*) for this customary court is for those only by copy of court-roll, and the lord or steward is the judge in distinction from a court-baron at common law, where the suitors are the judges, (*t*) see ante, §§ 631, 632; so, the copyholders attending to their fealty at this court are called "the homage," who are sworn to make their presentments in the same manner as the jury at a leet, see post § 643; and if a manor has a court of a double nature, that is, customary and court-baron, the proceedings of both may be entered on the same roll. (*u*)

636. There are several other franchises usually annexed to manors, all of which are not exclusively manorial rights, as to hold a court-leet, to have wreck, treasure trove, estrays, *waifs, and *bona fugitivorum*, deodands, markets and fairs, and tolls, each of which will be considered in its order; besides which there are other manorial rights, the fruits of tenure, which, belonging properly to that branch of the subject, will be treated of under the head of COPYHOLDS, see post, under that title.

IV. To have a Court-leet or Hundred.

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| <p>§ 637. What is a Court-leet.
Appendant to a Manor.
Style of the Court.</p> <p>638. Appendant to a Hundred.
to a Vill.
but not to a Church.</p> <p>639. How to be claimed.
To be held at what time.</p> <p>640. Where to be held.
Notice of holding.</p> <p>641. Doing Suit to the Leet.
Suit Real and Suit Service.</p> <p>642. Exemptions.
Clergy.
Tenants in Ancient Demesne.</p> <p>643. Jurisdiction of the Court-leet.
Common Nuisances.</p> <p>644. Not private Wrongs.</p> <p>645. Inquiring of the Profits of the Lord.</p> <p>646. Presentment, how made.</p> | <p>§ 646. Requisites of the Presentment.</p> <p>647. Officers in the Leet.
Steward.
Bailliff.
Reeve.
Aleconner.</p> <p>648. Constable.
Refusal to accept Office.</p> <p>649. Exemptions from serving Office.</p> <p>650. Barristers and Attorneys exempt.</p> <p>651. Fines.</p> <p>652. Amercements.</p> <p>653. How assessed.</p> <p>654. Remedies for Fines.
Action.
Distress.</p> <p>655. Remedies for Amercements.
Distress.
Action of Debt.</p> |
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§ 637. The leet is a court of record derived out of the sheriff's town: (*x*) and to every court-leet is annexed the view of frank-pledge, or an examina-

(*q*) Melwiche's case, 4 Co. 26 b.

(*r*) R. v. Staverton, Yelv. 190. See also Cro. Jac. 260.

(*s*) 1 Inst. 58.

(*t*) Kitch. 163; Co. Cop., s. 45; Tr. 102; Melwiche and Linter, 4 Co. 26 b.

(*u*) Ib.; 1 Inst. 58.

(*x*) 2 Inst. 71; 4 Inst. 261.

tion of the persons resident within a leet, who were anciently called "frankpledges," that is, sureties to answer any complaint. A court-leet may be appendant to a manor, though not necessarily incident *to it like a court-baron;(y) and the style of the court is, "The Court-leet with [*496] view of Frank-pledge of E. C., &c., held," &c.; and if appendant to a manor, and held with the court-baron, it may be thus—"The Court-leet, with view of Frank-pledge and Court of E. C., &c."(z)

If a leet is appendant to a manor, and the queen purchases two parts of the manor, the leet remains appendant to the other part;(a) and so, if the lord enfeoffs another of his manor, without mentioning the appurtenances, he retains the leet;(b) but a man shall not have a leet in his manor within the leet of another seignior;(c) yet there may be a superior leet, at which the residents of the inferior leet are to attend, see *infra*, § 646.

638. A leet it seems is not strictly incident to a hundred, because one liberty cannot be incident to another, but it may be appendant to a hundred.(d)

A leet may also be appendant to a vill or an ancient messuage,(e) for it may be presumed that the house is the site of a manor;(f) but it cannot be prescribed for as appendant to a church or chapel;(g) and if a leet belongs to a hundred, by a grant of lands in a vill, parcel of the hundred, with all leets *præmissis spectant' et pertinent'*, the grantee shall not have a leet within such vill.(h)

639. A leet may be claimed by charter or the queen's grant, for the queen may grant to a man to have power **tenere placita* within a certain precinct, &c., and before certain judges, and in a manner to exempt [*497] it from the jurisdiction of her superior courts;(i) so, a leet may be claimed by prescription which presupposes such grant.(k)

The leet shall be held at the time assigned by the charter,(l) but he that claims it by prescription, may claim to hold it once or twice every year, or upon any such days as, upon reasonable warning, shall be appointed;(m) so, it may be prescribed to be held *semel in anno*, upon which the lord may hold it when he pleases;(n) so, if the queen grant it to be held *semel in anno* without ascertaining the time;(o) but if the charter or prescription does not direct otherwise, by the equity of the statute *Magna Charta*, c. 35, it shall be held within a month after Easter, and a month after Michael-

(y) *Colebrooke v. Elliot*, 3 Burr. 1859.

(z) Co. Cop. 819, 3d ed.

(a) Bendl. pl. 45.

(b) Dy. 30, pl. 209; 1 And. 26. See also 18 H. 6, 11; 33 H. 6, 4, cited Bro. Incidents, pl. 2, 20; Lord Cobham and Browne's case, 1 Leon. 218.

(c) 1 Roll. 541.

(d) Bro. Leet, pl. 24; Id., Incidents, pl. 18. See also Lord Norris v. Barrett, Moor, 426; Lawson v. Hare, 2 Leon. 74; 2 Inst. 122, and contra, Kitchen, p. 78, who says that a leet is of necessity incident to a hundred, and cites 8 H. 7, 1. Also March, 75.

(e) 18 H. 6, 11.

(f) *Gittins v. Cooper*, 2 Brownl. 217.

(g) 10 E. 3, 5; 18 H. 6, 11; F. N. B. Leet, 8; Bro. Incidents, 29; Tyrringham's case, 4 Co. 37; Rowles and Mason, 2 Brownl. 200.

(h) Lord Norris v. Barrett, Moor, 427.

(i) 2 Inst. 71, 72.

(k) Ib. See also Finch's Law, 246.

(l) 2 Inst. 72; Dakin's case, 2 Saund. 291.

(m) 2 Inst. 72.

(n) Lawson and Hare's case, 2 Leon. 74.

(o) Id. 75, per two judges.

mas;(p) and if the leet does not appear to have been held at the lawful time, an indictment or presentment there will be void.(q)

640. The leet of the tourn is, by the statute *Magna Charta*, c. 35, to be held in a place certain; but it should seem that courts leet of hundreds or manors may be held in any place within the seigniorship where the lord pleases;(r) but there is a canon prohibiting the keeping of temporal courts leet or lay juries in the church, chapel, or churchyard.(s)

Fifteen days' notice of a court-leet is usually given, but in the absence of established usage three or four days' notice would be sufficient.(t) and if it be not an ancient leet, it appears that personal notice is necessary.(u)

[*498] *641. All resiants within the leet of the age of twelve years (except ecclesiastical persons, women, and barons of the realm) ought to do suit in the leet within which they are conversant, in person,(x) and after the age of twelve years, shall be sworn there to the queen;(y) but suit to the leet court is due by reason of resiancy, and has no reference to tenure,(z) therefore, no man can be obliged to do suit to the court-leet, within the precincts whereof he does not reside, in respect of any lands which he may have within the jurisdiction of it;(a) and in *R. v. Adlard*,(b) it is said, "This passage (quoting from Lord Coke, 2 Inst. 122) is a plain authority that the word 'inhabitant,' when the view of frank-pledge is spoken of, cannot mean an occupier, and it seems settled that a man cannot be of two leets;(c) for if a man hath a house within different leets he shall be taken to be conversant where his bed is;(d) hence the distinction between suit real and suit service, for the former is in respect of his resiance to a leet or town, and the latter by reason of a tenure of his land of the county, hundred, wapentake, or manor, whereunto a court-baron is incident.(d) Such suit real cannot be done by attorney.(e)

642. As to the exemptions of the clergy from doing suit real, it is to be understood that the exemption is personal; therefore the proprietor of lands, which were parcel of a dissolved monastery, held in frank-almoigne, and discharged of secular services, was held not to be exempt from attending the court-leet.(f)

Tenants in ancient demesne are also exempt from attendance,(g) but [*499] ancient demesne is no exemption from serving *the office of constable.(h) Attorneys, as it seems, cannot be amerced for not doing

(p) Dakin's case, sup.

(q) Staundf. P. C. 84 b.

(r) Br. Court-baron, 8; citing 8 H. 7. 3. See also Kitch. 88; Ow. 35.

(s) 2 Burn's E. L. 47 e, Phill. ed.

(t) Greenc, County Courts, p. 283. See also Br. Action on the Case, 75; Kitch. 88; 2 Inst. 72; Jenk. Pac. Cons. 2, 3; Scroggs, 13; Rits. on Courts Leet, 41; 2 Scriv. Cop. 822.

(u) Brook v. Hustler, 11 Mod. 76.

(x) 2 Inst. 99, 121.

(y) 1 Inst. 68, b.

(z) Kitch. 82; citing 45 E. 3. 23; 2 Inst. 99.

(a) 2 Hawk. P. C., b. 2, c. 10, s. 12.

(b) 4 B. & C. 780.

(c) Kitch. 65, 66; F. N. B. 159.

(d) 2 Inst. 122.

(e) Kitch. 145; F. N. B. 25. See also Tott v. Ingram, 1 Brownl. 186.

(f) Dacre v. Nixon, 2 Roll. Rep. 56.

(g) Br. Aunc. Dem., pl. 49, citing Reg., fo. 181. See also F. N. B. 14, E., marg.

(h) R. v. Bettsworth, 1 Vent. 344; S. C., 2 Show. 75.

suit at the leet, when their attendance in the queen's courts at Westminster is required.(i)

If the suitor does not appear at the leet, he shall be amerced and not distrained,(k) because for suit real no distress can be taken;(l) so, the queen cannot grant to another that he shall not do suit.(m)

643. By the common law the leet might inquire of all felonies;(n) now, by stat. Westm. 2, c. 13, no felony is determinable there;(n) so, a common nuisance may be inquired of at the leet;(o) as if a ditch be made across the highway,(o) as to turning or stopping waters,(p) making hedges or ditches to the disturbance of the people;(q) so, if a person who has no warren, stores his land with conies, it is a common nuisance inquirable at the leet(r) so, none may now erect a dovecot but the lord of a manor, and if any do it, he may be punished in the leet, but no action on the case lies by any particular man.(s)

644. But a presentment of the inclosure of a common is void, for this is a wrong, not a common nuisance;(t) so, a private nuisance is not inquirable in the leet, as if one surcharge a common,(u) or stop a watering-place for the inhabitants of B.,(x) or stop up a man's lights,(y) or suffer his own gate to be open to the annoyance of others.(z) So, a thing of necessity is a nuisance inquirable in the leet, as for a man to unload billets in a street or highway, for *necessity, &c. requires it;(a) or to erect a scaffolding for the [*500] repair of a building.(b)

645. But the leet may inquire of things which belong to the lord, as treasure trove;(c) so, wreck, by the 15 R. 2, c. 3;(d) so, waifs, for the lord of the leet has power to try waif by inquest, but the lord of the hundred not, for he has no power to try by jury;(e) so, estrays;(f) so, of outlaws and of their goods;(g) so, whether land be aliened in mortmain without license;(h) so, of customs and services, and by whom withheld.(i) As the jurisdiction of the leet was confined to pleas of debt under 40s., all pleas of land were necessarily excluded from its consideration.

646. No indictment or presentment shall be but by twelve, at least, by stat. Westm. 2, c. 13;(k) and when there are not twelve persons present, the steward may compel a stranger to be sworn;(l) and a presentment in a leet by twelve, of a matter within their jurisdiction, is not traversable,(m) but a presentment not within their jurisdiction, as where life or freehold is

(i) Stone's case, 1 Vent. 16. 29.

(k) 2 Inst. 118.

(l) F. N. B. 159, D., n. (a).

(m) Daere v. Nixon, 2 Roll. Rep. 56.

(n) 2 Inst. 32.

(o) 1 Inst. 56; 1 Roll. 541.

(p) Kitch. 41. 44.

(q) 9 H. 6. 44; 10 H. 6. 7; Bro. Lecte, 2, 26.

(r) Boulston v. Hardy, Moor, 453.

(s) Boulston's case, 5 Co. 104.

(t) Bro. Lecte, 30, citing 27 Ass. 6.

(u) 1 Roll. Abr. 541.

(x) 1 Inst. 56.

(y) 9 Co. 58.

(z) Moor, 356.

(a) 2 Roll. Abr. 32, 137.

(b) Id. 145.

(c) Stat. 18 Ed. 2.

(d) Kitch. 24.

(e) Bro. Lecte, 5, citing 44 E. 3. 19; Kitch. 45; Jenk. P. C. 27.

(f) Kitch. 22.

(g) Id. 23; Jenk. P. C. 27.

(h) Kitch. 23.

(i) Id. 10.

(k) Id. 89, citing 45 E. 3. 26; Bro. Lecte, 7; 2 Inst. 387; Cutler v. Creswick, 3 Keb. 362.

(l) 7 H. 6. 12; 12 H. 7. 15; Kitch. 13, citing 2 H. 7. 4; 4 Bro. Lecte, 14, 24.

(m) Kitch. 84, citing 41 E. 3. 27; 2 R. 3. 12; Scroggs, 84.

concerned, is bad ;(*n*) but it is settled that all presentments in leet may be removed by *certiorari* into the Court of Queen's Bench, and there traversed,(*o*) and a presentment by a less number than twelve is traversable,(*p*) so, if an inferior leet neglect to present a matter that is there presentable, it may be presented at the superior leet,(*q*) but it must be specially pleaded, [*501] and a general prescription *is not sufficient ;(*r*) so, there may be a superior leet belonging to a manor, which shall inquire of all matters which the inferior leet has neglected to present ;(*s*) and at this leet the reeve and four resiants ought to attend, but they cannot compel the attendance of an inhabitant who belonged to the particular leet, because a man cannot be of two leets.(*s*) The jurisdiction of a leet jury, like that of a grand jury, is confined to things done or neglected since the last court ; they, cannot, therefore, present things done subsequently to their being sworn,(*t*) and a custom for the jurors to be charged and sworn at one court to inquire and present, and to return their presentment at the next court, has been held bad ;(*u*) but it is said that in some manors the jury continue in office for a whole year.(*v*)

Every presentment in a leet must be certain, and state the precise day of holding the court,(*x*) and before whom held ;(*y*) but it does not appear necessary to state *quo jure*, as whether by grant or prescription ;(*z*) so, in replevin, it is sufficient to allege seisin of the hundred.(*a*)

647. The officers in a leet are the steward, the bailiff, the reeve, the aleconner, and the constable.

The steward is the judge of the court ;(*b*) but it has been said that in a private leet the lord may sit as judge, and exclude the steward ;(*c*) and the steward is a judge of record,(*d*) and he may be retained by deed or parol ;(*e*) so, he may make a precept to the bailiff to distrain by parol.(*f*)

*The duty of the bailiff is to impanel the jury,(*g*) but it seems [*502] that by custom the steward may nominate the persons to be summoned as jurors ;(*h*) where a bailiff is a prescriptive officer, having power to summon and select a jury, his function, as appendant to a court-leet, has been held sufficient ground for an information in the nature of a *quo warranto*.(*i*)

A reeve shall be sworn to do his office in the leet,(*k*) and his oath contains a declaration that he will execute all attachments and process to him

(*n*) Dy. 13, pl. 64 ; Keb. 66 ; Kitch. 84.

(*o*) R. v. Roupell, Cowp. 458.

(*p*) Kitch. 89, citing 45 E. 3. 26 ; 6 H. 4. 1.

(*q*) Loader v. Samwell, Cro. Jac. 551.

(*r*) Loader v. Samwell, Cro. Jac. 551.

(*s*) Cock v. Stubbs, Cro. Jac. 583.

(*t*) Moore v. Wickers, Andr. 47.

(*u*) Davidson v. Moscrop, 2 East, 56.

(*v*) Rits. on Courts Lect, 9 ; also, Vaughan v. Atwood, 1 Mod. 202 ; Palmer v. Barfoot, 1 Lutw. 440 ; Wicker v. Norris, cited in Bedford (Duke) v. Alcock, 1 Wils. 248.

(*x*) Dakin's case, 2 Saund. 290 ; S. C. nom. Dacon's case, 1 Vent. 107.

(*y*) 3 Keb. 251.

(*z*) R. v. Gilbert, 1 Salk. 200 ; S. C., 12 Mod. 4.

(*a*) Lawson v. Hare, 2 Leon. 74.

(*b*) Gentleman's case, 6 Co. 12 ; 4 Inst. 261. See also Withers v. Isenam, Dy. 70.

(*c*) R. v. Jennings, 11 Mod. 215.

(*d*) Gricsley's case, 8 Co. 41.

(*e*) Dy. 248 ; 1 Inst. 61, b.

(*f*) Kitch. 82.

(*g*) R. v. Harrison, 8 Mod. 135.

(*h*) R. v. Joliffe, 2 B. & C. 54.^a

(*i*) R. v. Bingham, 2 East, 398.

(*k*) Kitch. 92.

directed by the lord or his steward, and present all pound-breaches, waifs, estrays, &c.(*l*)

An aleconner was to be sworn to see that bread was weighed according to the size, and that ale was wholesome, &c.(*m*)

648. A constable is an officer chosen for the maintenance of the queen's peace. Both high and petty constables were recognized by common law, the former being officers of hundreds and the latter of tithings.(*n*) The high constable is regularly chosen by the justices at sessions, but by prescription he, as well as the petty constable, may be chosen by the leet,(*o*) and the right of election is in the jury;(p) but a corporation cannot elect a constable except by special custom;(q) but in default of election by the jury, the justices may appoint a constable,(r) yet only until the lord holds a court;(s) and the sessions cannot discharge a constable appointed by the leet, except under the provisions of the 13 & 14 C. 2, c. 12.(t)

*A refusal to accept the office of constable is an indictable offence;(u) so, he may be fined by the steward, if present, or [^{*503}] amerced, if absent.(v)

649. A person is not liable to serve the office of constable unless he be resident in the parish, occupying a house paying rates and taxes; carrying on business there is not sufficient if he do not sleep there;(x) but though a man is not bound to attend two leets, yet when a leet is held for a manor within a hundred, the tenant of the manor leet is not excused from serving the office of constable for the hundred, but a custom for the exemption might be good.(y)

650. A barrister, and a practising attorney, is, by reason of his attending the courts at Westminster, exempt from serving the office of constable, but this privilege does not extend to a physician;(z) so, not to a person because he is Master of Arts;(a) so, a certificate under 10 & 11 W. 3, discharging persons from serving parish offices, is no exemption from being sworn constable at a court-leet;(b) whether a gentleman of quality may be exempt, is not settled.(c) In Prouse's case,(d) it was held, that a woman could not be a constable, but in Vane's case,(e) a custom in a vill, where there are

(l) *Ib.*; 1 Inst. 234, b.

(m) *Kitch.* 92.

(n) *Crompt.* 6, b.; *Lamb. Off. Const.* 16; *R. v. Wyatt*, 1 *Salk.* 175; *S. C.*, 2 *Ld. Raym.* 1193; *R. v. King*, 3 *Keb.* 231.

(o) 4 Inst. 265; *R. v. Bernard*, 2 *Salk.* 502; *S. C.*, *Comb.* 416; *S. C.*, *Skin.* 669; *R. v. Hewson*, 12 *Mod.* 180; *R. v. Goudge*, 2 *Str.* 1213.

(p) *Fletcher v. Ingram*, 1 *Salk.* 175; *S. C.*, 1 *Ld. Raym.* 70; *S. C.*, 5 *Mod.* 127; *R. v. Stevens*, *T. Jo.* 212.

(q) *R. v. Bernard*, *sup.*

(r) *Abbot v. Moore*, 1 *Mod.* 13.

(s) *R. v. Davis*, 2 *Str.* 1050.

(t) *Lord Wentworth's case*, *Bulst.* 174; *Limington Constables' case*, 2 *Str.* 798.

(u) *Prigg's case*, *Al.* 78; *R. v. Line*, 2 *Stra.* 920.

(v) *Griesley's case*, 8 *Co.* 38; *S. C.*, *Siv.* 93.

(x) *R. v. Adlard*, 4 *B. & C.* 778.¹

(y) *R. v. Genge*, *Cowp.* 13, recognizing *R. v. King*, 3 *Keb.* 197. 230; *S. C.*, 1 *Freem.* 348; also, *R. v. Jennings*, 11 *Mod.* 215.

(z) *Pooradge's case*, 1 *Mod.* 22; *S. C.*, 1 *Sid.* 431; 2 *Keb.* 578.

(a) *Herson's case*, 5 *Vin.* 429.

(b) *R. v. Darbyshire*, 2 *Burr.* 1182.

(c) *Pooradge's case*, *sup.*; *R. v. Wright*, 1 *Keb.* 439.

(d) *Cro. Car.* 389.

(e) 1 *Sid.* 355.

¹*Eng. Com. Law Reps.* x. 458.

several houses, that every one shall be constable in turn, was held good ; “ For though it shall happen to be the turn of a widow, she may have one to serve, and then he who serves is sworn, and he is a constable and not a deputy ;” see also *R. v. Stubbs*.(f)

[*504] A person appointed constable cannot appoint a deputy *without the sanction or consent of some other authority.(g)

651. A fine may be imposed by the steward upon any officer of the leet for neglect of his duty, as if a bailiff refuse to make return of the panel,(h) or a juror to be sworn ;(i) so, for a contempt in view of the court, as putting on his hat in court,(k) or saying to the steward “ You lie ;”(l) *sed secus* as to words not importing contempt ;(m) but the fine must be reasonable ;(n) and therefore, if a fine in a court-leet be unreasonable, it may be avoided by plea and judgment of the court, for the judges are to determine the reasonableness of a fine.(n)

But for a thing not in his view, the steward cannot fine, as for not doing suit,(o) or where a constable is not present at the time of his election.(p)

652. For an offence in the leet, not done in the presence of the steward or in contempt of the court, a man may be amerced, for an amercement is properly the act of the jury, and a fine the act of the court,(q) for those only who have consance of a thing may impose a fine or amercement for the same thing ; therefore, where an offence is presented by a jury, the punishment is by amercement, not fine, though it be a contempt ;(r) but there shall not be an amercement in the leet for a trespass done to the lord himself, for [*505] he shall not be judge in his own cause ;(s) so, not *for non-payment of rent to him, for which he may distrain ;(t) so, there can be no amercement in a leet for an encroachment on the rights of a lord of a manor ;(u) so, not for an inclosure of the waste, and erecting a cottage thereon ;(u) so, not for any particular damage to the lord.(u)

653. An amercement ought to be imposed with mercy, and therefore it is called *misericordia*,(v) and shall be proportioned according to the offence to the lord, and not the damage to the tenant ;(x) so, when fixed by the jury, it must be affeered and moderated by others ;(y) and the jury ought to assess it at a sum certain,(y) and the affeement ought to be by persons chosen by

(f) 2 T. R. 406.

(g) *R. v. Adlard*, 4 B. & C. 778. See also *Vane's case*, 1 Sid. 355.

(h) 8 Co. 38 ; Roll. Abr. 218.

(i) Id. 219.

(k) *Bathurst v. Cox*, T. Raym. 68.

(l) *Lincoln (Earl) v. Fisher*, Cro. El. 581 ; S. C., Ow. 113 ; S. C., Moor, 470.

(m) *Berrington v. Brooks*, T. Jo. 229.

(n) *Griesley's case*, 8 Co. 38.

(o) *Hall v. Turbett*, Cro. El. 241. See also *Lukin v. Eve*, Moor, 88, 89.

(p) *Fletcher v. Ingram*, 1 Salk. 175 ; S. C., 5 Mod. 130 ; S. C., 1 Ld. Raym. 70 ; S. C., Skinn. 635.

(q) Palm. 7. See also 7 H. 6. 12, cited Bro. Leet, 12 ; Id., Fine pur Contempts, 44 ; Id., Amercements ; *Godfrey's case*, 11 Co. 43 ; *Griesley's case*, 8 Co. 41.

(r) *Moore v. Wickers*, Andr. 47.

(s) 1 Roll. Abr. 211, citing 12 H. 4. 8. b.

(t) Ibid.

(u) *R. v. Dickenson*, 1 Saund. 135.

(v) 1 Inst. 126.

(x) F. N. B. 75, E.

(y) *Wilton v. Hardingham*, Hob. 129 ; *Evelin v. Davies*, 3 Lev. 206.

the steward and sworn for that purpose; (z) but the affeerors may be, and usually are chosen from the jury, (a) and the affeerment must be made at the same court; (b) but the reasonableness of an amercement, once affeered, cannot be questioned in a writ of error. (c)

654. A fine imposed by the steward is recoverable in an action of debt; (d) it may also be recovered by distress, (e) even without a custom, a distress being incident to a court-leet of common right, *Pierson v. Ridley*, (f) and in this case it is said, that though of common right a distress may be taken for a fine in a court-leet, that is, where it is imposed for such things as are of common right incident to its jurisdiction, as for contempts or the like, yet when custom only enables them to set a fine, it cannot be distrained for without *a custom also; so where it is for a private advantage of the lord, it cannot be distrained for without a prescription. [506] (g)

655. An amercement is recoverable either by distress or action. If an amercement be affeered, the lord may distrain for it of common right, without prescription, (h) and the distress may be taken in any place within the precinct of the leet, (i) even in the common street; (k) but a distress cannot be taken for an amercement in a place out of the jurisdiction, and therefore it is necessary to plead the bounds of the leet with certainty; (l) so, it may not be upon the goods of a stranger, (m) though they be upon the land of the offender; (m) so, the bailiff cannot distrain *ex officio*, but he must have a special warrant from the steward; (n) and if a bailiff justifies in trespass, he ought to show the precept; (o) but in replevin this is not necessary. (o)

So, debt lies for an amercement affeered, (p) and debt on an amercement may be joined with a debt on a *mutuatur*; (q) so, in debt for an amercement of a freeholder, it must be proved to have been affeered by freeholders, otherwise the action will not lie; (r) so, if the names of the affeerors be not set forth in the declaration, it shall be intended that it has been done by the steward. (s)

(z) *Evelin v. Davies*, sup.

(a) *Kitch.* 153; *Gill*, Eq. Rep. (b) *Scrogg.* 150; *Cutler v. Creswick*, 3 Keb. 363.

(c) *Stubbs v. Flower*, 1 Bulst. 125; *Crompton on Courts*, 225.

(d) *Griesley's case*, 8 Co. 38.

(e) *Swan v. Morgan*, *Lex Man.* 80. App. *Keilw.* 66 b.

(f) 2 Keb. 701, 739, 745; S. C. nom. *Pierson v. Ridge*, 204; S. C., 1 Vent. 105.

(g) *Godfrey's case* 11 Co. 45 a. (h) *Prat v. Stearn*, Cro. Jac. 382.

(i) *Bro. Leet*, 28, citing 2 H. 4. 24; *Kitch.* 86, citing 8 R. 2, *Avowry*, 194.

(k) *Kitch.* 86, citing 19 E. 2, *Avowry*, 221.

(l) *Wilton v. Hardingham*, Hob. 129; *George v. Lawley*, *Skin.* 393.

(m) *Pell v. Towers*, Noy, 20.

(n) *Steverton v. Scrogs*, Cro. El. 698, per *Popham*; sed contra, per *Gawdy*. But see *Matthews v. Carey*, Carth. 73; S. C., 3 Salk. 52; S. C., 3 Mod. 138; and *Lamb v. Mills*, 4 Mod. 378; *Skin.* 587; also *Robson on Courts Leet*, 121. (o) *Matthews v. Carey*, sup.

(p) *Prat v. Stearn*, Cro. Jac. 382. (q) *Bedford (Duke) v. Alcock*, 1 Wils. 248.

(r) *Baldwin v. Tudge*, 2 Wils. 20.

(s) *Griesley's case*, 8 Co. 40 b; *Cutler v. Creswick*, 3 Keb. 362.

[*507]

*V. To have Wreck.

§ 656. What is Wreck.

657. Flotsam, Jetsam, Lagan.

658. Prerogative as to Wreck.
Restitution to the Owner.

659. Wreck as a Franchise.

660. Claimed by a Subject.

661. Right commonly annexed to Manors.

§ 661. May be prescribed for.

May be claimed by Custom.

But a consideration must be shown
to support a Custom.

662. Goods derelict.

663. Possession of Wreck.

Recovery of Wreck.

§ 656. Wreck is where goods, after shipwreck, are thrown upon the land, and no man, dog, or other animal escapes alive out of the ship ;(*t*) but if any animal escapes alive, it will not be a wreck, for a dog and cat are put but for examples, (*u*) and the statute Westm. 1, c. 4, (3 Ed. 1.) is deemed to be only a declaration of the common law. (*x*) (1)

So, if a ship be in distress, all desert her, and any one come alive to land, though the ship afterwards perishes, there will be no wreck ;(*y*) so, if a ship, being in a tempest, cut its cable, the anchor is not wreck ;(*z*) so, where a ship at sea was pursued by enemies, and the men for the safeguard of their lives left the ship, and the enemy took the ship and spoiled her of her goods and tackle and turned her into sea, and she was driven ashore by the weather, where the men arrived, it was resolved by all the judges of England that the ship was no wreck nor lost. (*a*) In order, therefore, to constitute wreck, not only must there be no life saved, or vestage remaining by which the property may be identified, but the goods must be cast or left on the land by the sea, (*b*) and this is the legal signification of the word "wreck" (*c*) and the jurisdiction over such property belongs, therefore, not [*508] *to the admiral, but to the common law ;(*d*) therefore, if the ship perish, and any of the servants escape, held, that the goods are not wreck. (*e*)

657. To wreck also belongs what has been technically called *flotsam*, *jetsam*, and *lagan*.

Flotsam is where goods after shipwreck be floating or swimming upon the top of the water. (*f*)

Jetsam is anything cast out of the ship being in danger of a wreck, and beaten to the shore by the waves, or cast on it by the mariners. (*f*)

Lagan is where the goods are cast into the sea, and the ship afterwards perishes, and the goods are so ponderous that they sink to the bottom, but the mariners, with intent to get them, fasten to them a buoy or cork, or other such thing as will not sink, so that by such things they may find them again. (*f*) And none of those goods which are called *flotsam*, *jetsam*, or *lagan* are called wreck so long as they remain in or upon the sea ; but if any of them are driven to the land by the sea, then they shall be said to be wreck ;

(t) 2 Inst. 166.

(u) Id. 167.

(x) Vaugh. 164.

(y) 2 Inst. 167.

(z) 2 Roll. Abr. 159.

(a) 2 Inst. 167, citing Fishlake's case, 5 R. 2.

(b) Bract. l. 3, fol. 120 ; 11 H. 4. 16 ; Vaugh. 162.

(c) 2 Inst. 167.

(d) F. N. B. 112, C. ; 2 Inst. 167.

(e) 5 Ed. 3. 3.

(f) Constable's case, 5 Co., 106 ; Blount, nom. verb. Flotsam.

so that *flotsam*, *jetsam*, and *lagan* pass by the grant of wreck ;(*f*) but this is only when the ship perishes, or the owner of the goods is not known, for goods cast into the sea for fear of tempest are not forfeited, (*g*) and so long as goods *flotsam*, &c., are upon the sea, they do not pass to the queen, but to the first finder. (*h*)

658. By the common law all wrecks belong to the queen, (*h*) for by her prerogative she has dominion over the sea, and is entitled to all derelict goods of merchants ; and she has a right of way over any man's ground for her wreck. (*i*)

By the statute 3 Ed. 1, c. 4, if any goods be saved, they *must be kept by view of the sheriff, coroner, &c., and bailed in the hands [*509] of those of the town where found ; and if any person proves property within a year and a day, they shall be restored to him without delay, if not, they remain to the queen. (*k*) If the goods are not kept by the sheriff, but taken away by the neighbours, the owner shall have a commission of *oyer and terminer*, to inquire of the trespass and make restitution. (*l*) The year and day, within which the owner may prove his property, shall be computed from the seizure as wreck ; (*l*) and if the owner dies, his executor or administrator may prove his property ; (*l*) so, if the goods are *bona peritura*, the sheriff may for necessity (which is excepted out of law) sell them within the year. (*l*)

But wreck of the queen's goods will not alter the property in them, (*m*) and she is not confined to her proof within a year and a day like a subject. (*n*)

659. Wreck may, however, belong to a subject by grant or prescription, or even by mere usage, for it seems that in some cases usage will give a subject a right against the prerogative, (*o*) and so in the case of wreck, (*p*) for it is said that in ancient times wreck of the sea and other casualties belonged to the first finder, although afterwards the right was transferred to the king as the head of the republic. (*q*)

In cases of express grant, it is said, that rights or privileges within a certain precinct shall not be extended, although the precinct itself is afterwards extended, and therefore, where wreck of the sea was granted to a man in all his lands, this grant should not extend to the land whereof he was then disseised, and into which he afterwards re-entered, because at the time of the grant he had only a right in the land, and the grant at the time of the making of it could *not extend to the land which was then not his own, but another's, viz. the disseisor's ; (*r*) so, it has been [*510] held, that if any liberty was resumed by Act of Parliament which a corporation had, and the lands came to the king who granted over the land with *tot talia*, &c., as the corporation had, the resumed liberty would not pass, unless there were special words of grant *de novo* ; (*s*) *sed secus* where the

(*f*) Constable's case, 5 Co. 106 ; Blount, nom. verb. *Flotsam*.

(*g*) 46 Ed. 3. 15. (*h*) Constable's case, 5 Co. 108. (*i*) Vaugh. 164 ; 6 Mod. 149.

(*k*) Vaugh. 164. (*l*) 2 Inst. 163.

(*m*) Plowd. 213. (*n*) 2 Bro. Wreake de Meare, citing 35 H. 6, 27 ; 2 Inst. 163.

(*o*) Case of Mines, Plowd. 322. (*p*) Hale, De Jure Maris, p. 41.

(*q*) 2 Inst. 163, citing Bracton, l. 3, fo. 120. (*r*) Plowd. 130.

(*s*) W. Jo. 349.

liberty was appendant to a manor originally in the hands of an abbot;(s) and a grant of Duchy lands is subject to the same incidents as a grant of lands belonging to the Crown.(t)

660. It seems that the Lord High Admiral may have wreck by prescription, "for the Lord High Admiral's office(u) is an ancient office:" but it cannot be claimed as appurtenant to his office; therefore, when a manor, to which wreck belonged by prescription, came to the king's hands, who granted to A. "the office of Admiral, with all wrecks at sea and all profits to the said office belonging," and after this granted the manor to B., under whom the plaintiff claimed, it was held that those words did not pass the wreck belonging to the manor by prescription.(x)

661. This franchise is most usually annexed to manors, and may also be parcel of or belong to a hundred;(y) and a right to wreck of the sea *infra manerium* is a strong presumption that the shores are parcel of the manor;(z) so, one may prescribe to have wreck between high and low water mark, and it is said, that those of the west country prescribe to have wreck in the sea so far as they may see an Humber barrel;(a) so, one may prescribe to have *flotsam* and *jetsam*, City of Bristol and Lord Berkeley,(b) and in this case, where the Lord Berkeley had a manor adjoining to the Severn, *where he prescribed to have wreck, and certain goods [*511] floated between high and low water mark, and the City of Bristol had *flotsam* there, it was held, that the said goods were not wreck so long as they floated in that manner.(c)

Although usage, as before observed, (see ante, § 659,) may give a subject a right to wreck, yet, in that case, the custom must be founded upon some consideration, or it will be void; therefore, where the plea in trover was the custom that, if a ship perished, the lord should have the best anchor and cable, it was held bad, for that the custom was without consideration and void;(d) but, in a similar action for taking an anchor and cable by virtue of a similar custom, where the defendant (the lord of the manor of Burling) shewed that the lord of that manor had been used, when any wreck happened upon the manor between high and low water mark, to take care of the sick and wounded, and to bury the dead, and to preserve the goods cast there, for the use of the proprietor, and in consideration thereof, to have the ship's best anchor and cable, this was held to be a good consideration, and the custom not unreasonable.(e)

662. Goods which are considered wreck, by being cast upon the land, are called *derelict*, that is, deserted by the owners, and this happens upon many occasions, as, where they come from infected towns and places, and

(s) W. Jo. 349.

(t) *Alcock v. Cooke*, 5 Bing. 340.*

(u) Per Holt, C. J., 12 Mod. 260.

(x) *Wiggin v. Branthwaite*, 12 Mod. 259; S. C., Holt, 758; S. C. 1 Ld. Raym. 473.

(y) Hale, *De Jure Maris*, 42.

(z) Id. 27.

(a) *Constable's case*, 5 Co. 108.

(b) Cited in *Constable's case*, sup.

(c) City of Bristol and Lord Berkeley, cited in *Constable's case*, 5 Co. 106.

(d) *Geere v. Burkenham*, 3 Lev. 85; S. C., 2 Danv. 429, pl. 9.

(e) *Simpson v. Bithwood*, 3 Lev. 307.

though never purposed for merchandize, they will be wreck when they come on shore ;(*f*) so, boats or other vessels forsaken, or found on the sea without any person in them, are also said to be derelict ;(*g*) so, again, goods never intended for merchandize, which are thrown overboard to lighten a ship in a storm, are wreck if cast on shore, although there be no subsequent shipwreck ;(*h*) but goods, as it seems, (though *intended for traffic,) [*512] which are cast overboard to lighten the ship, are not considered as derelict, (*i*) *sed quære* ; and a question also arose at that time, whether derelict goods were liable to customs' duty. (*j*) This point was first raised in Saunders's case, (*j*) and it seemed to be then considered, that as the king was not chargeable with customs, so his grantee, who was to enjoy the privilege in like manner with himself, ought not to be liable, and in Sheppard v. Gosnold, (*k*) it was decided that wrecked goods were not liable, and this decision was confirmed in a subsequent case, Courtney v. Bower, (*l*) although in a previous case, Power v. Portman, (*m*) it was held, that goods wrecked or *flotsam*, should pay customs, and now, by Act of Parliament, derelict goods are made liable ; see the Customs' Act, 3 & 4 W. 4, c. 56, Dig. P. i. tit. Flotsam.

663. Possession of the wreck is in him that has the right, and Fitzherbert lays it down, that if a man have wreck by prescription or grant, and goods be wrecked on his land, he may have an action of trespass against any one for taking them away. (*n*)

When wreck is to be recovered, the jurisdiction is not in the admiral, but in the courts of common law, (*o*) but the Court of Admiralty shall have cognizance of *flotsam*, *jetsam*, and *lagan*, because the latter are on the sea ; therefore, in a case between the Lord High Admiral and Sir Henry Constable, part of the goods claimed and taken on behalf of the admiral passed by the name of wreck, and part being *flotsam* did not pass, and entire damages were assessed, judgment was consequently given against the plaintiff. (*p*) As to the plundering of wrecks, see Dig. P. i. tit. Larceny ; and as to salvage, see Dig. P. i. tit. Wreck.

*VI. To have Treasure trove and Estrays.

[*513]

§ 664. What is Treasure trove.

665. What is an Estray.

What is not Estray.

666. Who shall have the Estray.

Retaking of Estray.

667. Right of Lessee.

Right of Wife.

Right of Infants.

Right of Tenant in Common.

§ 667. Right of Executor.

668. Claiming Estray by Owner.

669. How an Estray may be used.

670. Nature of the Lord's Right in an Estray.

671. Swan an Estray.

Swan Marks.

Swans claimed by Prescription.

(*f*) Sheppard v. Gosnold, Vaugh. 168.

(*g*) 1 Rob. Rep. 41.

(*h*) Sheppard v. Gosnold, sup.

(*i*) Sheppard v. Gosnold, Vaugh. 168.

(*j*) Moor. 224.

(*k*) Vaugh. 151.

(*l*) Ld. Raym. 501.

(*m*) Molloy, c. 8, s. 9.

(*n*) F. N. B. 91, D.

(*o*) 2 Inst. 168.

(*p*) Constable's case, 5 Co. 106. See also Bourne's case, Palm. 96 ; Le Seigneur (Admiral) v. Linsted, 1 Sid. 178 ; S. C. nom. Duke of York v. Linstred, 1 Keb. 657.

§ 664. According to ancient authors, treasure trove originally belonged to the finder,^(q) but by the law of England from a very early period has belonged to the king as his prerogative, or to some lord of a manor or liberty by special grant or prescription.^(r) Nothing is said to be treasure trove but gold and silver,^(s) but it may be either bullion, coin, or plate.^(s) It is immaterial whether it be found hidden in the ground, or in the ruins of any house or other building, or elsewhere ;^(s) but treasure found in the sea still belongs to the finder.^(t)

Treasure trove, as well as wreck, shall be inquired of by the coroner,^(u) and the concealment of it is punishable by fine and imprisonment.^(v)

665. An estray, *animal vagans*, is properly any beast, not being wild, which is found wandering within some lordship or manor,^(w) but the term is applied also to swans or cygnets,^(x) (see post, § 671,) although not to any other bird.^(y)

[*514] *When no one can make title to estrays, the law gives them to the queen, or to lords of manors claiming under a grant from the Crown ;^(z) but a man cannot have estrays in gross by prescription, because they lie in grant, and will not originally pass without charter.^(a) If no claim be made within a year and a day, the estray belongs to the lord, but he has not an absolute property in it until the year and day are passed ;^(b) so, it will not be an estray by the common law, although it continues for a year and a day, if it be not proclaimed within a reasonable time,^(c) and properly, at the next market day of the nearest market town,^(d) or, according to others, in the two nearest market towns, &c. ;^(e) and the year and day are to be computed from the seizure.^(g)

So, if the lord or his bailiff do not seize it as an estray, it shall not be so, for that begins the property,^(h) except in the case of the queen ;⁽ⁱ⁾ so, cattle which come for common cannot be estray ;^(k) so, not the queen's cattle which come into the manor of another.^(k)

666. If cattle stray into the manor of A., and within the year stray to the manor of B., and continue there for a year and a day, and are proclaimed, B., shall have them as estrays ;^(k) so, if the first manor was the queen's manor ;^(k) so, if a stranger within the year takes the cattle, and puts them into the manor again as his own, and they continue there for a year and a day, they will be an estray,^(l) *sed secus* *if the lord put them into a place out of the manor ;^(m) and it is said that the lord cannot retake

(q) Glanv. de Leg., c. 1 ; Bract., 1. 3, fol. 120.

(r) Staundf. P. C. 39, b. ; 1 Inst. 114, b. ; 3 Inst. 132.

(s) 3 Inst. 132.

(t) Kitch. 78 ; 2 Inst. 168.

(u) 3 Inst. 133.

(v) Kitch. 49.

(w) Fitzh. Abr. Estray, pl. 3.

(x) 7 H. 6, 27, 28 ; Fitzh. Bar., pl. 6 ; Bro. Double Plee, 41 ; Kitch. 79.

(y) 4 Inst. 280.

(z) Taylor v. James, Godb. 150 ; Englefeld's case, W. Jo. 285 ; Hazlewood's case, Ow. 14.

(a) Tattersall's case, W. Jo. 283.

(b) Br. Estray, pl. 11, citing 33 H. 8 ; Kitch. 79 ; Finch's Law, 45.

(c) Picadai v. Gosmore, Winch, 68 ; S. C. nom. Pleydell v. Gosmore, Hutt. 67.

(d) Henley v. Welsh, Holt, 564 ; S. C., 2 Salk. 686.

(e) Br. Estray, pl. 10 ; Kitch. 79 ; Finch's Law, 45 ; Brownlow v. Lambert, Cro. El. 716.

(f) Henley v. Welsh, sup.

(h) Hutt. 67 ; see also Palm. 486.

(i) Dy. 386, pl. 40.

(k) 1 Roll. Abr. 878.

(l) Id. 879.

(m) Palm. 486.

it if it strays into another's land before the year expires, for no property is vested in him until after the year and a day;(n) but it has been otherwise decided,(o) and it has been said, that he may retake it if the other does not seize it as an estray.(p)

667. So, if A. leases his manor, in which an estray was, before the year expired, the lessee, after the expiration of the year and day, shall have it, and not the lessor, for he had the custody only during the year, and the property vests in him who has the custody at the end of the year and day.(q)

If an estray happen within the manor of the wife, and the husband die before seizure, the wife shall have it, for that the property was not in the wife before seizure.(r)

So, the property of infants and others under disabilities is equally bound, after the year and day, as well in the case of estrays as of wreck.(s)

If two tenants in common be of a manor to which estrays belong, no action will lie by the one against the other who should alone seize the estray, unless by prescription the one is to have the first estray, and the other the second, and one of them should take the beast pertaining to the other.(t)

If the lord dies before the year expires, and afterwards the estray continues in the manor for a year and a day, yet the executor of the lord shall have it, and not the heir, for when the year is expired, the property relates to the seizure.(u)

668. The owner of an estray may claim it at any time after the year and day if proclamation be not made;(x) and *without telling any [*516] marks, or making any proof of property, (which may be done on the trial,) the owner may, within the year, seize his animal where he finds him on tendering satisfaction;(y) and, in pleading tender, he need not, as in the case of a trespass, show a sum certain, because he is not a wrong-doer;(y) but, if the owner does not tender reasonable amends for his pasture, the lord may detain it.(y)

669. If the lord uses cattle taken as an estray, by riding or working them, &c., he will be a trespasser *ab initio*;(z) so, a custom alleged, to put cattle taken as an estray into a moor, part of the manor, and there fetter them if they are unruly, is not good;(a) but using an estray for necessity is justifiable, as, if a cow be taken it may be milked;(b) so, a sheep taken as an estray may be sheared;(c) so, fetters may be put on a colt which cannot otherwise be prevented from breaking fences;(d) so, an estray should be kept in *loco aperto*, on land in the lord's possession, being part of the

(n) Bro. Estray, 11.

(o) 12 Co. 102.

(p) Pleydell v. Gosmore, Hutt. 67.

(q) 12 Co. 102.

(r) 1 Inst. 351, b., citing 43 Ed. 3, 8; 10 H. 6, 11.

(s) Constable's case, 5 Co. 108.

(t) 1 Inst. 200.

(u) Moor, 11, pl. 43.

(x) Taylor v. James, Godb. 150.

(y) Henley v. Welsh, 2 Salk. 685.

(z) Bagshaw v. Goward, Cro. Jac. 147; S. C. nom. Bagshaw v. Gawin, Noy, 119; S. C., Yelv. 96.

(a) 1 Roll. Abr. 879; Pleydell v. Gosmore, Hutt. 67; S. C., Winch. 63.

(b) Bagshaw v. Goward, sup.

(c) Id., Noy, 119, citing Prideux's case.

(d) Pleydell v. Gosmore, sup.

demesnes of the manor;(e) and the bailiff of the lord cannot depute his authority by delivering the estray to the care of another.(e)

670. It is said in one case, that the lord could not maintain trespass for an estray, until the day and year were passed,(f) but he may have a special action on the case for such taking;(f) and if a stranger take an estray out of a manor, the lord may have an action of trespass;(g) but he cannot prescribe, that if any stranger chase an estray out of the manor, he shall be [517] amerced for the same in the court of the manor, such a prescription is void against a stranger;(h) yet it is said, that trover lies against a stranger for an estray without actual seizure,(i) for he has more than a simple possession, he has a possession that will turn into property;(k) (see also on this point of possession, 2 Wms. Saund. 47, n. (1); 7 T. R. 398; 2 Taunt. 306-309;) so, a lord shall have a replevin if a stranger take it;(l) and so, after seizure, a lord shall be charged for trespass done by any estray.(l)

671. A swan being a royal bird, may, as before observed, be an estray (see ante, § 665), and no one can have a swan mark except by grant or prescription,(m) and by the 22 Ed. 4, c. 6, now repealed, a qualification to keep swans was required; and although a subject was then permitted to have swans, yet, if they were without a mark, if any such swans gained their liberty, and were found in open common rivers, they might be seized by the king's officers as royal birds;(n) but it is not competent to seize those birds as estrays, if they be lawfully put into the place whence they have been taken, even although they may be in a strange manor; thus, in trespass for taking swans, the defendant made a claim by his plea to estrays as pertaining to his lordship, and said that the swans had strayed, and that proclamation had been made, and that as soon as it was discovered that the swans belonged to the plaintiff, they were delivered up.

The plaintiff replied, that he was seised of a manor adjoining to the lordship in question, and prescribed to have swans swimming through that lordship from time immemorial; and further, that notice had been given to the defendant that these swans were the plaintiff's; and the replication was held good, for the plaintiff might lawfully put in his swans in the place where they could not be estrays, any more than cattle could be so in places where [518] they ought to have common, thus deciding that a prescription for swans to swim in another's manor or lordship is good.(o)

But a prescription for swans must be accurately set out, and therefore, where one prescribed for all wild swans which are animals *feræ naturæ*, and not marked, in a certain creek, the prescription was held bad, and it was like prescribing for all partridges and pheasants within a manor, which a man cannot have *jure privilegii*, but so long only as they are within the

(e) Taylor v. James, Noy, 119; Godb. 151.

(f) Burdet v. Matthewman, Clayt. 107.

(g) Harvie v. Blackcole, Brownl. 236.

(h) 20 H. 8, cited Benl. 21, pl. 38; see also S. C., Dy. 199 a, marg.

(i) 2 Keb. 539.

(k) Bull. N. P. 33.

(l) Pleydell v. Gosmore, Hutt. 67.

(m) Case of Swans, 7 Co. 16.

(n) 7 Co. 16.

(o) Bro. Estrays, pl. 3, citing 7 H. 6. 27.

place ;(*p*) but one may prescribe to have a game of swans within his manor, as well as a warren or a park ;(*q*) and so a custom that if any swan, which hath its course in any water running to the Thames, within the same county, comes on the land of any man and there builds, and hath cygnets on the same land, then he who hath the property of the swan shall have two of the cygnets, and he who hath the land shall have the third cygnet which shall be of less value than the other two, has been held to be good ;(*r*) and in this case there were two plaintiffs, one who was the owner of the cock-birds, and the other of the hens, and they had cygnets between them ; and it was held that the plaintiffs should join in one action, because by the custom of the realm, which is the common law in such cases, the cygnets belonged to both the owners in common, and should be divided between them equally ;(*r*) so, in *Parker v. Combleford*,(*s*) it is said that the case 2 R. 3, pl. 15, "Custom for Swans," that the owner of the land shall have a ground-bird is good, for the ease which they have to make their nests there.

*VII. *To have Waifs and Bona Fugitivorum et Felonum.* [*519]

<p>§ 672. What is Waif. What it is not. 673. Goods waived forfeited to the Queen. 674. Right of the Lord to Waif. 675. Fugitive's Goods, when forfeited or otherwise.</p>	<p>§ 675. How claimed. 676. Forfeiture of Felon's Goods. How claimed. Felo de se. Provision of 7 & 8 Geo. 4, c. 28.</p>
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§ 672. If a man steal goods, and being pursued, for fear of being apprehended waives the goods out of his possession, these goods are said to be *waif* ;(*t*) or if to ease him in flight, he waives them ;(*u*) so, though he leaves the goods at a common inn ;(*x*) but if he has not the goods with him when he flies, being pursued, or for fear of being apprehended, then they are not waived or forfeited, but the owner may take them when he will ;(*x*) so, if the owner challenge the goods upon fresh suit, and before seizure, it seems they shall not be forfeited ;(*y*) so, if a thief steals goods and conceals them in the ground or other secret place, and afterwards flies, they are not forfeited as waif ;(*z*) so, if he throws them into the house of another, and there leaves them and flies ;(*z*) so, if he takes goods as a trespasser, and waives them ;(*a*) so, if a thief leaves a horse stolen at a common inn, for a certain sum by the week for his meat, it is no waif ;(*b*) so, the goods of an alien merchant cannot be forfeited as waifs, and if waived by the felon after the alien's death, they belong to the executor of the alien. (*c*)

(*p*) Case of Swans, 7 Co. 15.

(*q*) Id. 16 b. (r) Id. 17 a.

(*s*) Cro. El. 725.

(*t*) Foxley's case, 5 Co. 109.

(*n*) Staundf. P. C. 186.

(*x*) 2 Roll. Abr. 809 ; see also 22 Vin. Abr. Waife, 408, pl. 1, 2.

(*y*) Dickson's case, Hetl. 64.

(*z*) Foxley's case, 5 Co. 109 ; S. C. nom. Foxley v. Annesley, Cro. El. 693 ; S. C. Moor, 572.

(*a*) Staundf. P. C. 186.

(*b*) 2 Roll. Abr. 809.

(*c*) Waller v. Hanger, 3 Bulst. 19. See also Scroggs, 130.

*673. All goods waived are forfeited to the queen, and she shall [*520] keep them as her own, (d) for the owner loses his property in them, because he did not freshly pursue the felon, (e) and the queen's bailiff, or another in her right, may seize them; (f) but before seizure by the queen or her patentee, the owner of the goods may take them, though it be twenty years after the stealing; (f) so, after seizure, if he makes fresh suit and attaints the felon; (f) but see *contra* Bro. Forfeitures de Terres, pl. 110, citing 21 E. 4. 16; Staundf. P. C. 186; Kitch. 80; Hale, P. C. 541, and Rastal, Restitution, 2, where it is said that the property is changed by the seizure; see also 21 H. 8, c. 11, which gives restitution, if the felon be indicted and attaint by evidence given by the party. (g)

674. Goods forfeited as waif may belong to a subject by the grant from the Crown, and this franchise is usually annexed to manors; but waif is to be claimed only by special grant or prescription, and does not belong to the lord of a hundred or manor by reason of the hundred or manor; (h) but to justify seizing of stolen goods, it must be alleged that a felony was committed, and that the goods were waived by the felon; so, in an action against the lord for misusing a horse stolen from the plaintiff, who alleged fresh suit and that the felons were attainted, it was held that the defendant ought to have traversed the fresh suit whereof the plaintiff had declared, the property being thereby preserved; (k) so, it seems either the stealing or the waiving may be traversed. (l)

So, the better opinion seems to be that in the case of waifs as of estrays, [*521] (see ante, § 670,) the lord may have *trespass or trover against a stranger, for waif taken out of his manor, even where there has been no seizure. (m)

675. *Bona fugitivorum* are the proper goods of him who flies for felony, for upon the presumption of his guilt he forfeits all his goods which he had at the time of his flight; (n) so, if the jury who find the flight acquit him of felony; (o) so, if it be found that an accessory before or after the fact fled; (p) so, also, if it be found by inquest before the coroner that he fled; (p) so, a man forfeits his goods by the flight found, though he has a pardon of the felony, (p) or was killed in his flight; (p) but a man does not forfeit his goods by flight, if he is not indicted in his lifetime, (p) nor if the flight be found before a coroner who has no jurisdiction. (p)

The goods of fugitives can only be claimed by the Crown, or by grant from the Crown; (q) but not by prescription, for they are not forfeited till found upon record that the party fled for the felony, (q) see further infra § 676.

(d) Staundf. P. C. 186.

(e) Foxley's case, 5 Co. 109; S. C. nom. Foxley v. Annesley, Cro. El. 693; S. C., Moor, 572.

(f) Staundf. P. C. 186.

(g) 5 Co. 111; 3 Inst. 242.

(h) Br. Estray, pl. 2, citing 44 E. 3. 19.

(i) Davies' case, Cro. El. 611.

(k) Rooke v. Denny, 2 Leon. 192.

(l) Br. Issues joines, pl. 68, citing 12 E. 4. 5.

(m) F. N. B. 91, B; Kitch. 89; Scroggs, 132.

(n) Foxley's case, 5 Co. 109 b.

(o) Staundf. P. C. 183 b; Foster, 272.

(p) Staundf. P. C. 184 a.

(q) Foxley's case, 5 Co. 109 b, 110.

676. *Bona felonum* are the goods of any one convicted of felony, for he forfeits to the queen all his goods and chattels which he had at the time of the conviction ;(*r*) so, if a man be *felo de se*, he forfeits all the goods which he had at his death, if he is found *felo de se* by inquest before the coroner, or by presentment before justices, who have conusance of felony.(*r*)

The goods of felons, as of fugitives, can be claimed only by the Crown or by a grant from the Crown,(*r*) and not by prescription, see ante, § 675. By such grant, the grantee, it is said, shall have the debts and specialties, &c., as well as *other goods, though there are no special [*522] words ;(*s*) so, a grant of *bona et catalla felonum* will not pass the goods and chattels of a *felo de se*.(*s*)

If a man be found *felo de se* by the coroner's inquisition, the jury ought also to find whether he had any goods and chattels at the time he committed the felony, or not ; and if he had any, to specify the same in an inventory annexed to the inquisition ;(*t*) but by 7 & G. 4, c. 28, s. 5, it is provided that where any person is indicted for treason or felony, the jury impannelled to try such person shall not be charged to inquire concerning his lands, tenements, or goods, nor whether he fled for such treason or felony.

VIII. To have Deodands.

§ 677. Definition of a Deodand.

When Things are Deodand or otherwise.

Things movable.

Coach.

§ 677. Ship.

Not Things fixed to the Freehold.

678. How forfeited.

How appropriated.

§ 677. Deodands are defined to be *omnia quæ movent ad mortem* ;(*u*) and therefore every beast, or movable thing inanimate, which occasions the death of a man within the body of a county, without the default of the person himself or another, shall be forfeited to the Crown as a deodand, though the thing was not in motion at the time, if it be movable ;(*x*) and as well where the man by misadventure falls upon the thing, as where the thing falls upon him ;(*x*) and therefore if the sword of B. is used by A., and another *is killed with it, it will be a deodand ;(*y*) and formerly, not [*523] only the thing that was the immediate cause of death, but all things moving with it were held to be deodands ; therefore, if a man riding upon a carriage fell from it, and the horses drew the carriage upon him by which he died, the horses and carriage were a deodand ;(*z*) but in this day, if a man is killed by the wheel of a coach going over him, the wheel only is the deodand, as being the immediate cause of the death ;(*a*) and a thing which

(*r*) Id. 110.

(*s*) 2 Roll. Abr. 195 ; sed contra, Lord Northampton v. Lord St. John, 2 Leon. 56 ; Jurado v. Gregory, 1 Vent. 32 ; R. v. Sutton, 1 Saund. 273 ; S. C., 1 Sid. 420 ; S. C., 2 Keb. 526.

(*t*) 1 Wms. Saund. 272.

(*u*) Dy. 77 b ; Foxley's case, 5 Co. 110.

(*x*) Staundf. P. C. 20.

(*y*) 3 Inst. 57.

(*z*) Staundf. P. C. 20 ; Case of the Lord of the Manor of Hampstead, 1 Salk. 220.

(*a*) R. v. Grew, Say. 249 ; R. v. Rolfe, Fost. Cr. Law, 266.

does not move with that which causes the death was formerly held not to be a deodand, though it was joined to it; as if a man falls from the wheel of a carriage and is killed, but the carriage does not move, the wheel only should be forfeited; (b) so, if a man riding through a river was thrown by the violence of the stream and drowned, then the horse or carriage was not considered as having moved to the death, and should not therefore be forfeited. (c)

A vessel or boat *in aqua dulci* may become a deodand, but not *in aqua salsa*; (d) therefore, where a ship lying at Redriff, in Kent, turned over at low water and killed a shipwright at work under her, it was held to be a deodand; (e) but where a man is killed by a fall from a ship into fresh water, the ship, but not the merchandize therein, will be deodand; (f) so, formerly, a distinction was taken between persons within the age of discretion and those who were not, (g) but this distinction is not observed now. (h)

[*524] Nothing fixed to the freehold shall be a deodand, as a *door or gate of a house, (i) or a bell in a church; (k) but if the thing is previously severed from the freehold it may be a deodand, as where a man was killed by the sail of a wind-mill which by the violence of the wind had been severed from the mill. (l)

678. A deodand shall be forfeited to the queen, or to him who claims by patent, (m) but no man can prescribe for it, it must be by the grant of the Crown; (n) and by inquisition before the coroner it must be found that it is deodand, and the value set. (o) But deodands do not meet with countenance in Westminster Hall; when a jury has found too little, the courts will not interpose in favour of the Crown or of the lord of the franchise, though they will, if it has found too much, in favour of the subject. (p)

By the 4 & 5 W. & M. c. 22, lords of manors and others having grants of deodands must have the same enrolled in the Crown Office.

Formerly, deodands forfeited to the Crown were disposed of *in eleemosynam*, to some charitable purpose by the king's almoner, (q) but they are now appropriated as part of the casual revenues of the Crown. (r)

(b) Staundf. P. C. 20.

(c) Lord Chandos's case, Cro. Jac. 483; S. C., Poph. 136; S. C., nom. R. v. Ld. Cavendish, 2 Roll. Rep. 23; S. C., cited 1 Salk. 220.

(d) Bract. l. 3, c. 5, fol. 122; 3 Inst. 57; 2 Hale, P. C. 422 et seq.; Hawk. P. C., c. 26.

(e) 2 Molloy, 225, c. 1, s. 13.

(f) Hawk. P. C. c. 26, s. 6.

(g) 3 Inst. 57.

(h) Hawk. P. C. c. 26.

(i) 1 Sid. 207.

(k) Axminster Parish case, 1 Lev. 136; S. C., 1 Sid. 207; S. C., Ld. Raym. 97; see also R. v. Wheeler, 6 Mod. 187.

(l) 1 Sid. 207.

(m) Dy. 77 a, 107 b.

(n) Foster's Cr. Law, 266.

(o) Staundf. P. C. 21 a.

(p) Foster's Cr. Law, 266.

(q) 3 Inst. 57.

(r) Foster's Cr. Law, 265, 266; Molloy, 225; Lex. Man. 72.

*IX. To have a Market or Fair.

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| <p>§ 679. What is a Market and a Fair.
 Claimed by Prescription or Grant.
 680. Place of holding a Market, &c.
 Nature and Extent of the Right.
 Ancient Market.
 681. Time of holding a Fair.
 682. Who bound by Sale in Market
 overt.
 Exceptions to the Rule.
 The Queen.
 When Toll has not been paid.
 Sale in a Shop.
 There must be a Contract as
 well as a Sale.
 Covenous Sale.
 A Sale not a Gift.
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 683. Definition of a Toll.
 When payable or otherwise.
 For Things brought into the Market.
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 684. By whom payable or otherwise.</p> | <p>684. Not by the Queen.
 Nor Tenant in Ancient Demesne.
 685. Unreasonable Toll.
 686. What is Stallage.
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 688. Definition of Piepoudre Court.
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 690. Right to a Market, &c., not ex-
 tinguished by Unity of possession.
 But may be forfeited by Nonuser.
 By Misuser.
 691. What is a Disturbance of the Right
 to a Market, &c.
 What User will confer a Right.
 692. Grantee of a newly erected Market.
 693. Obligation to provide Accommoda-
 tion.
 694. Right to Tolls.
 Right of Corporations and Lords of
 Manors.
 695. Remedies.</p> |
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§ 679. A market is the privilege within a town to have a market.^(s) Every fair is a market, but not *e contra*.^(t) This subject embraces the following particulars:—

1. How a market or fair is claimed.
2. When and how held.
3. Effect of sale in a market or fair.
4. Court of Piepoudre.
5. Duties payable in respect of a market or fair.
6. How lost.
7. Disturbance of a market or fair.

*1. How a Market or Fair is claimed.

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679. None can have a market or fair but by grant or prescription;^(u) but a grant of a fair or market has usually a clause *quod non sit ad nocumentum*, &c.; therefore, if it be to the prejudice of the queen or others in any respect, the patent shall be avoided;^(x) and if such market or fair be to the nuisance of any one, the patent may be repealed by *scire facias*^(y) though a writ of *ad quod damnum* had preceded the grant,^(z) and the words *nisi sit ad nocumentum*, &c., have been omitted in the grant;^(a) but whether it be to the nuisance or not is a matter of evidence.^(b)

(s) Blount, nom. verb. Market.

(t) 2 Inst. 401.

(u) 2 Inst. 220.

(x) Id. 406.

(y) R. v. Butler, 3 Lev. 222; S. C. nom. Sir Oliver Butler's case, 2 Vent. 344; see also R. v. Marsden, 3 Burr. 1818.

(z) Butler's case, 2 Ventr. 344.

(a) 2 Roll. Abr. 140.

(b) Yard v. Ford, 2 Saund. 174.

2. *Where and how a Market is to be held.*

680. The usual place where a market is held is the market place, not every place within the same town.^(c) If the queen grant a fair generally, the grantee may keep it where he pleases;^(d) so, if she grant a fair to be held in such a town, place, &c., he may keep it in what part of the town he pleases,^(d) and see also *Mosley v. Walker*,^(e) in which latter case it is said, "Generally speaking, where a market is granted to a particular individual, he may either permit every place within the specified limits of the market to be the place where articles may be sold, or he may, if he thinks fit, fix upon a particular place within which the sale shall take place, and he may say that different places shall be appropriated to the sale of different articles." In *Curwen v. Salkeld*,^(f) it was decided "That the lord of a [*527] market might determine in what part of the township it should be *held, and might shift it from place to place, or confine the right of holding the market to a particular place."^(g)

The lord of an ancient market may, by law, have a right to prevent other persons from selling goods in their private houses situated within the limits of his franchise,^(h) but "It cannot be laid down as a general rule and principle of law, that the grant of a market for the sale of certain things necessarily carries with it an exclusion of the right of sale of similar commodities in a private house."⁽ⁱ⁾ "The question (submitted to the jury) was, whether upon the evidence the franchise of the plaintiff entitled him to that exclusive right. Of that there was abundant evidence, for where there is a grant of franchise, the exercise of the right under the grant is evidence of the nature and extent of the grant."^(k) But the grantee of such a franchise is bound to provide suitable accommodation for those who attend the market.^(k) "I take it to be implied in the terms in which a market is granted, that the grantee, *if he confine it* to particular parts within a town, shall fix it in such parts as will from time to time yield to the public reasonable accommodation, and that if the place once allotted ceases to give reasonable accommodation, he is bound, if he has land of his own, to appropriate land on which to hold it, or if not, to get land from other people, in order that the market, which was originally granted for the benefit of the public, as well as for the benefit of the grantee, may be effectually held."^(k) But this is a question for the jury, and having, as it appears in this case, been left properly to them, the Court refused to disturb the verdict.

681. By the stat. Win., 13 Ed. 1, c. 6, which remains unrepealed, (see Dig. P. i. Chronol. Tab.,) fairs or markets shall not be kept in churchyards. By the 2 Ed. 3, c. 15, the lord of the fair shall publish for what time it shall continue, and shall not hold beyond his due time. By the 5 Ed. 3, c. 5, [*528] "if a merchant sell after the time published, he shall forfeit double the goods sold. By the 27 H. 6, c. 5, a fair or market

(c) Godb. 131.

(d) *Dixon v. Robinson*, 3 Mod. 108.

(e) 7 B. & C. 41.

(f) 3 East, 538.

(g) Per Bayley, J., *Mosley v. Walker*, 7 B. & C. 41.

(h) *Mosley v. Walker*, sup.

(i) Per Lord Tenterden, C. J., *Ib.*

(k) Per Bayley, J., *Ib.*

is not to be held upon principal feasts, Sundays or Good Friday, (four Sundays in harvest excepted,) upon forfeiture of all goods sold to the lord of the franchise. And he that has no day for it, but only such festival, shall hold his fair or market within three days before or after proclamation being first made; and he that has other days sufficient, shall hold it the full number of days allotted for his market or fair, such festival days, &c., excepted; and this was in confirmation, as it seems, of the common law; ^(l) but a prescription to hold a fair on the 29th Sept. is good, though it may be a Sunday, for a fair on that day is not void, though the goods then sold shall be forfeited by the 27 H. 6, c. 5. ^(m)

3. *Effect of a Sale in Market overt.*

682. It has been said, that at common law all sales and contracts of anything vendible in fairs or markets overt, should not only be good between the parties, but should bind those that had right thereunto, even infants, *femes covert*, *idiots*, and *non compotes mentis*, also persons beyond sea and and in prison, and so, executors and administrators; ⁽ⁿ⁾ ⁽¹⁾ but this rule admits of many exceptions and qualifications:—

1. It shall not bind the queen as to any of her goods sold in market overt by any person. ^(o)

2. It must be such a sale as will change the property; ^(p) when, therefore, horses, &c., are sold in market overt without paying toll, then the sale is void by the 2 Ph. & M. c. 7, and 31 El. c. 12, (see Dig. P. i. tit. Horses,) and the property is not changed; ^(q) so it is said in an early case, that the property of goods is not changed by sale in market overt, unless toll be paid; ^(r) and in *Comyns v. Boyer*, ^(s) it is expressly held, [*529] that in pleading market overt, it is not necessary to state that toll is paid, for payment of toll (it is added) is not of necessity, and in many villis no toll is used to be paid.

3. Although a sale in a shop in London is good, for there is market overt, every day except Sunday, yet the sale to be valid, must be in the open shop, not in a warehouse, nor in any other part of the house; ^(t) so, a sale in a shop is not a sale in market overt, unless the goods are there proper to be sold; therefore, where stolen plate was sold openly in a scrivener's shop on the market day, held, that this sale should not change the property, for a scrivener's shop is not a market overt for plate; *sed secus* if the sale had been openly in a goldsmith's shop; ^(x) so, the queen cannot grant that a shop should be a market overt. ^(y)

(l) 2 Inst. 220. (m) *Comyns v. Boyer*, Cro. El. 485. (n) 2 Inst. 713.

(o) Plowd. 243; Doct. and Stud. 3.

(p) Perk., s. 93; Jenk. 83, pl. 62; Bro. Property, pl. 39, citing 9 H. 6, 45.

(q) Case of Market overt, 5 Co. 83; *Comyns v. Boyer*, Cro. El. 485.

(r) Bro. Property, pl. 39, citing 35 H. 6, 29, but Brook says quere.

(s) Cro. El. 485.

(t) Bishop of Worcester's case, Moor, 360; see also *Clifton v. Chancellor*, Moor, 625; Dy. 99 b. marg., pl. 66; *Panton v. Hassell*, Hct. 63.

(x) Case of Market overt, 5 Co. 83.

(y) *Clifton v. Chancellor*, sup.

(1) Kent in his Com., vol. 2, 323-4, says, these markets overt depend on special customs, and this rule does not apply in this country.

4. The contract as well as the sale must be in market overt, therefore, where the contract for the sale of stolen goods was made out of the market, held that the property was not changed by the completion of the sale in the market overt. (z)

5. If the sale be covenous, it will not bar the right of him that has right, as where the buyer knows that the seller has no right; (a) or, where the seller is of such an age that the buyer must know him to be an infant; (a) or, where the seller is known to be a *feme covert*, not selling with the consent of the husband. (a)

6. It must be a sale for valuable consideration, not a gift, for fairs and markets were not instituted for gifts, but for sales. (a)

[*530] 7. So, a sale must not be in the night, but must be *between the sun rising and sun setting, yet a sale in the night will be good between the parties, although it will not bind a stranger who has right. (b) So, a sale in a covert place within a fair or market is bad. (c.)

8. A custom that a sale in market overt shall be binding is bad, for it tends to a monopoly. (d)

9. There cannot be a market overt for pawning, and held that the Court cannot take notice of the custom of London, unless it has been certified by the recorder. (e)

4. What Duties are payable at a Market or Fair.

683. The principal duties usually payable at a fair or market are toll, stallage, or pittance.

Toll is a reasonable sum due to the lord of the fair or market, for things sold there which are tollable; (f) but toll is not of common right incident to a fair or market, (f) and cannot, therefore, be claimed except by grant or prescription, (g) and, therefore, it is not sufficient to allege the grant of a market, with all tolls belonging, but there must be alleged an express grant or a prescription; (h) so, toll is payable of common right only on live cattle, not of victuals or wares, &c.; (h) and although as a rule, toll cannot be paid at any market for things brought thither, only for things sold, yet, by custom, toll shall be paid for every thing brought to market, but if it is a new fair, custom will not support it. (i) So, if an ancient fair or market returns to the Crown, the toll is not extinct; but if the queen re-grants the fair, the toll passes; (k) *sed secus* if she grants a fair *de novo cum omnibus libertatibus pertinent*, he shall not have toll. (k)

Toll can only be taken in respect of things actually brought into the market and there sold, therefore, a prescription *for toll of corn brought [*531] into a town to be sold on a market day there, whereof only part is

(z) Dy. 99, pl. 66.

(b) 2 Inst. 714.

(d) Clifton v. Chancellor, Moor, 625.

(e) Hartop v. Hoare, 1 Wils. 8; S. C., 2 Str. 1187.

(g) Heddy v. Welhouse, Moor, 474.

(h) Kerby v. Whichelow, 2 Lutw. 1502, recognized in Wells v. Miles, 4 B. & A. 564.

(i) 1 Leon. 218; Hollaway v. Smith, Stra. 1171.

(a) 2 Inst. 713; W. Jo. 164.

(c) Moor, 360; 1 And. 44; Poph. 84.

(f) 2 Inst. 220.

(k) Palm. 78.

pitched within the market for sale, and there sold, is bad, *Wells v. Miles*,^(l) and *Hill v. Smith*.^(m)

In the former of these two cases it was said, that the king could not grant a toll for things not brought into the market, but that the vill in that case should be taken for the market; in the latter case it was held, that a prescription for toll, in respect of goods sold by sample and afterwards brought into the market, could not be supported.

But a claim of toll to be taken in specie for goods sold in a market is supported by evidence of a right to toll for goods brought into the market and there sold, without shewing any right to toll for goods sold in the market, though not brought there, *Moseley v. Pierson*; ⁽ⁿ⁾ and it is there said, "The expression, a sale in the market, imports that the goods sold are brought into the market and ready to be delivered to the purchaser. Now, here the claim is of a toll in specie, which necessarily implies that the commodity in respect of which the toll arises is brought into the market."^(o)

684. Regularly, toll shall not be paid before the sale, for it is due from the buyer and not from the seller,^(p) unless there be a special custom to the contrary;^(q) but the queen shall not pay toll,^(r) so, tenants in ancient demesne are exempt from the payment of toll,^(x) and the privilege extends as well to tenants at will as to tenants for life or years,^(s) and to tenants who hold of a subject as of the queen;^(t) so, it extends to the lord himself;^(u) but the *exemption is only in respect of such things as [^{*532}] arise or grow on the land, or such as are bought for manuring it, and for the necessary use of the tenant and his family, and does not extend to general merchandise,^(x) and he need not prescribe for the privilege, for it is incident to his estate, therefore it is sufficient to say that he is tenant and inhabitant within the manor of A., which is ancient demesne,^(y) and it seems not necessary to allege notice that he is tenant in ancient demesne, although it may be advisable so to do.^(y)

So, if a man has a grant to be discharged of toll in respect of goods bought for his own use and bought since his grant;^(z) so, he shall be exempted in a fair or market of the queen;^(z) and, though the grant be for her only, and not for her, her heirs and successors, yet it is good against the successor.^(a)

A grantee, to be quit of toll, may plead his exemption;^(b) so, an inhabitant of a borough exempted by charter;^(b) so, an inhabitant of the duchy of Lancaster;^(c) and a prescription for an inhabitant is good, being for a discharge.^(d)

By the 2 & 3 Ph. & M. c. 7, it is provided, that the owner of every fair

(l) 4 B. & A. 564, recognizing *Kerby v. Whichelow*, 2 Lutw. 1502.

(m) 4 Taunt. 520.

(n) Per Lord Kenyon, C. J., *Moseley v. Pierson*, 4 T. R. 104.

(n) 4 T. R. 104.

(q) *Leight v. Pym*, 2 Lutw. 1331.

(p) 2 Inst. 221.

(r) 2 Inst. 221.

(s) The case of the Town of Leicester, 2 Leon. 191.

(t) *Ib.*; see also *Savery v. Smith*, 2 Lutw. 1146.

(u) Bro. Aunc. Demesne, pl. 43; *Savery v. Smith*, sup.

(x) *Ward v. Knight*, Cro. El. 227; S. C., 1 Leon. 232; but see F. N. B. 228; 1 Roll. Abr. 321.

(y) *Savery v. Smith*, 2 Lutw. 1146.

(z) 2 Inst. 221.

(a) Yelv. 15.

(b) *Leight v. Pym*, 2 Lutw. 1332.

(c) *Osbuston v. James*, 2 Lutw. 1379.

(d) *Smith v. Gatewood*, Cro. Jac. 152, recognised in *Osbuston v. James*, sup.

or market should appoint one in a special open place to take the toll, and enter the names and dwellings of all persons parties to a bargain for a horse, and the colour, with one special mark of such horse, and by the 31 El. c. 12, the bookkeeper is to make no entry, unless he truly know the seller of the horse or his voucher, their names and dwellings, and then he shall truly enter the same and the price of the horse, on pain of 5*l.* for every default.

685. If the toll granted be unreasonable, the grant will be void ;(e) so, by the stat. West. 1, 3 Ed. 1, c. 3, if the lord *take outrageous toll, [*533] the king shall take the franchise ; and if taken by a bailiff without the command of the lord, he shall render to the plaintiff so much more as he has taken, and shall be imprisoned for forty days. An outrageous toll is any toll when there is none due, or the party is discharged of toll,(f) or if more be exacted than is due ;(f) and, therefore, an action on the case lies against him that takes an outrageous toll, that is, of him that ought to be quit,(g) and the judges are to determine whether the toll be reasonable or no.(h)

686. Stallage is a duty for the liberty of having stalls in a fair or market,(i) or of removing them from one place to another.(j) Erecting a stall in a market is not of common right ; therefore, whoever will have a stall in a market must first have a license for that purpose from the owner of the soil, or otherwise trespass lies, Northampton (Mayor, &c.) v. Ward ;(j) and it is there said, "Every man has of common right a liberty of coming into any public market to buy and sell without paying any toll, if it be not due by custom or prescription, yet if he wants any particular easement or convenience, as a stall in the market, he must have the license of the owner of the soil for that purpose, if there be no particular sum fixed by the custom of the market for stallage ; if there be a fixed sum or duty by custom, that cannot be exceeded, but still he must agree with the owner of the soil ;"(k) so, it is a trespass to set tables in a market place for the sale of goods thereon, without leave of the owner of the soil.(l)

The owner of a house next to a fair or market cannot open a shop for selling in a market without payment of stallage, for if he takes the benefit of the market, he ought *to pay the duties there.(m) If a man pre- [*534] scribe for a toll, that is *pro quolibet stallâ*, it is well, for toll is a general word ;(n) by special custom, a man shall have toll for goods in a market sold or unsold,(o) but that seems to be for stallage.(p)

687. Piccage is a duty for picking holes in the lord's ground for the posts of the stalls.(q) Stallage and piccage are incident to the soil, for the right to a market and the right to the soil are very different things, and these rights may belong to different persons ; therefore, if the queen grant

(e) 2 Inst. 220 ; Heddy v. Wheelhouse, Cro. El. 558 ; see also Moor, 474 ; Yelv. 13.

(f) 2 Inst. 220.

(g) Wood v. Hawkshead, Yelv. 13.

(h) 2 Inst. 222.

(i) Palm. 77.

(j) 1 Wils. 109 ; S. C., 2 Str. 12, 38.

(k) Per Lec, C. J., Ib.

(l) Norwich (Mayor, &c.) v. Swan, 1 Bl. 1116.

(m) 2 Roll. Abr. 123.

(n) 2 Lutw. 1519.

(o) Id. 1336.

(p) Com. Dig. Market, (F. 1.)

(q) Palm. 77.

a fair or market with toll certain to one and his heirs, to be held within land that is Borough-English, and the grantee dies, the heir at the common law shall have the fair or market and the toll, but the youngest son shall have the piccage and stallage with the soil by the custom.(r)

5. Court of Piepoudre.

688. This court is incident to a market as well as a fair, in the same manner as a court-baron is to a manor,(s) and, by custom, may be held where there is no fair or market.(t) It is a court of record in which the steward is the judge,(u) and to this court the following things are essential:—1. The cause of action must arise in the time of the fair or market, it cannot take notice of transactions happening on a different day than that on which it sits.(x) 2. It must relate to things which concern the market; therefore, for slander of wares previous to the market, the court has no jurisdiction.(y) 3. It cannot be held before the mayor, or *other person than the steward, by special custom.(z) 4. The jurisdiction shall [*535] be of contracts in the same fair or market, of goods there bought or sold,(a) or for battery or disturbance there.(b) 5. It must not be for things done out of the precinct of the fair or market,(c) and by the 17 E. 4, the steward shall not hold plea upon pain of 5*l.*, unless the plaintiff or his attorney swear that the contract, &c., in the declaration mentioned was within the time and precinct of the fair or market. And if it be sworn, the defendant may plead in abatement or under issue that it was not; and if there be no oath or it be found for the defendant, the plaint shall be dismissed, and the party left to his remedy at common law. But such oath need not appear upon the record;(c) so, if it does not appear in pleading that the suit there was for a matter within the jurisdiction, it will be void;(d) so, a penal information will not lie in this court, but judgment given on it is not void but voidable.(e)

689. A right to appoint a clerk to the fair or market is also incident to the franchise;(g) his office consists in inquiring whether the weights and measures are according to the standard.(g) He is entitled to his reasonable fees, but he cannot prescribe to have 2*d.* or any other rate for viewing and examining measures.(h)

6. How lost or otherwise.

690. Fairs, markets, and tolls, as also free warren, are not extinguished by the land coming to the Crown, with the liberties, although it is otherwise with waifs, estrays, felons' goods, and such like liberties.(i) But this fran-

(r) Heddy v. Welhouse, Moor, 474, cited Northampton (Mayor, &c.) v. Ward, 1 Wils. 109. (s) Howel v. Johns, Cro. El. 773. (t) 4 Inst. 472.

(u) Ib.; see also Skinn. 33.

(x) Howel v. Johns, sup.

(y) 4 Inst. 272; 10 Co. 73; Howel v. Johns, sup.

(z) Anon., Skinn. 33.

(a) 4 Inst. 272.

(b) Howel v. Johns, Cro. El. 773.

(c) 4 Inst. 272.

(d) Anon., Skinn. 33.

(e) Wilkinson v. Nethersol, Cro. El. 530.

(g) 4 Inst. 273.

(h) Id. 274.

(i) Heddy v. Welhouse, Moor, 474.

[*536] chise *may be forfeited either by non-user or misuser. It has been held that the non-user of a fair or market, or courts, or such like liberties, wherein the subjects have interest for their common profit or common justice, is cause of seizure of them; but the non-user of parks or warrens, or such like, which are to the profit or pleasure of the owner only, is not any cause of their loss or forfeiture.^(k)

As to forfeiture by misuser the stat. Northampt., 2 Ed. 3, c. 15, provides that if a man holds his fair beyond the time allowed, he forfeits the franchise;^(l) so, if he hold his market at another day,^(l) or holds his fair for three days when he ought to hold it only for two;^(l) but if a man take outrageous toll, he does not forfeit the market, only the toll.^(m)

7. *Disturbance of a Market, and the Remedies.*

691. The grantee or owner for the time being of the franchise of a market may have an action on the case against a person who erects a stall upon his own ground for selling meat, though he should not take toll or usurp a franchise;⁽ⁿ⁾ so, in an early case it had been held, that a person could not prescribe to have a market in his own house against one who had the franchise of a market in the same place, Prior of Dunstable's case;^(o) and on the authority of this case it was held, in *Mosley v. Walker*,^(p) that by grant or prescription the owner of such a market may prevent persons, being inhabitants, from selling in private houses. But twenty years' uninterrupted use gives a *prima facie* right to a fair or market, and is a sufficient answer to an indictment for obstructing a highway; so, if the grantee of a market, under letters-patent from the Crown, suffer another to erect a market in his neighbourhood, and use it for the space of upwards of twenty years without *interruption, he is by [*537] such use barred of his action on the case for disturbance of his market."^(q)

692. It seems not to be settled, that the grantee of a newly erected market can, by virtue of such grant merely, maintain an action on the case, for disturbance of a franchise, against a person selling marketable articles in his own shop within the franchise, but not within the limits of the market place, on the market day;^(r) but a claim by immemorial custom to exclude others from selling such commodities on the market day, is valid in law;^(s) and where a market for meat, &c. was proved to have been in existence in the reign of James I., proof that the grantees of the market had for the last hundred years appointed market lookers, and that no butchers' shops had existed out of the market place until 1810, and that the shops then set up were

(k) The case of Leicester Forest, Cro. Jac. 155.

(l) 2 Roll. Abr. 124.

(m) 2 Inst. 221; Palm. 82.

(n) *Mosley v. Chadwick*, 7 B. & C. 47, n. (a.)

(o) 11 H. 6, 7, 13, 13, a. b, cited Bro. Prescription, 98; 8 Co. 127.

(p) 7 B. & C. 40; S. C., 9 D. & R. 863.

(q) *Holcroft v. Heel*, 1 B. & P. 400; see also *Campbell v. Wilson*, 3 East, 203.

(r) *Macclesfield (Mayor, &c.) v. Pedley*, 4 B. & Ad. 397.

(s) *Ib.*, recognizing *The Gravesend case*, 2 Brownl. 179; *Mosley v. Walker*, 7 B. & C. 40.

objected to by the grantees, was held to be sufficient evidence of such immemorial right.(t)

693. But the grantee of a market is bound to provide reasonable accommodation for those who attend the market ; therefore, where part of the space granted for a market was used for other purposes than those specified in the grant, and the remaining part became insufficient for public accommodation, held, that the lord of the market could not maintain an action against an individual for selling vegetables in the neighbourhood of his market, and thereby depriving him of toll, even at the time when there was room in the market, without showing that on the day when the sale took place he gave notice to the seller that there was room within the market ;(u) and it is a question for the *jury whether the accommodation be sufficient or not, [*538] and where the jury decided that the accommodation was sufficient, the Court refused to disturb the verdict.(x)

694. As tolls are only due by grant or prescription, and cannot be established by usage under a recent charter or by reference to neighbouring markets,(y) it seems doubtful whether, if no specific toll be granted in letters-patent, the grantee of a market be entitled to any toll, and whether, in such a case, he can support an action for an injury to his market.(z)

As a grant of a fair or market may be made either to lords of manors or to boroughs and other places.(a) questions may sometimes arise as to the respective rights of these different parties ; therefore, where King Charles II. by charter granted to the corporation of Walsall two fairs, to be holden annually, and confirmed to them all markets which had been heretofore holden, with a reservation of the rights of the lord of the manor, it appeared that a market had been holden immemorially in the High-street of Walsall until a very late period, when the corporation finding it inconvenient, removed it to another and more convenient place within the borough ; and also that the corporation had exercised other rights of ownership, as by taking down the old market place and erecting a new one, and by ordering that the market and fairs for pigs and other cattle should henceforth be kept in the new market place, and no longer in the High-street ; it also appeared that though the lord of the manor appointed the clerk of the market, yet he did not receive any toll from the persons frequenting it ; on an indictment, therefore, of the defendant, by the corporation, for a nuisance in erecting stalls in the High-street after the removal of the market, the judge, upon the trial, left it to *the jury to say whether the corporation were owners of the market, adding that if they were, the right of removal [*539] was incident to the grant. The jury having found in the affirmative, the Court refused to grant a new trial.(b)

695. As to the remedies in case of a disturbance of a market before the

(t) *Macclesfield (Mayor, &c.) v. Pedley*, 4 B. & Ad. 397.^b

(u) *Prince v. Lewis*, 5 B. & C. 363 ; S. C., 2 C. & P. 66.

(x) *Mosley v. Walker*, 7 B. & C. 40.^d

(y) *Lowden v. Hieron*, Holt, 547.

(z) *Holcroft v. Heel*, 1 B. & P. 400.

(a) *Case of Dorking Market*, 2 Taunt. 133 ; *Tewksbury (Bailliffs, &c.) v. Brieknell*, Id. 220.

(b) *R. v. Cotterill*, 1 B. & A. 67.

^bEng. Com. Law Reps. xxiv. 87. ^cId. xi. 252. ^dId. xiv. 13.

3 & 4 W. 4, c. 27, s. 36, abolishing assizes, (see Dig. P. iii. tit. Limitations,) "if a fair or market were set up to the nuisance of another, the party aggrieved might have an assize of nuisance,(c) but now the remedy is an action on the case as in other cases of disturbance;(d) and where a party is a wrongdoer without any claim of right, an indictment for a nuisance may be sustained,(e) see ante, § 694.

It seems doubtful whether an information in the nature of *quo warranto* for a usurpation upon the Crown, by holding a fair or market, can be granted on the application of a private person;(f) but it seems clear, that it will not lie for the bare encouraging and promoting the holding of a market, it being at most a misdemeanor, and no usurpation of a franchise.(f)

In some cases, equity will interfere to enforce the lord's right to tolls.(g)

[*540]

*X. To be a Corporation.

§ 697. Definition of a Corporation.

Different Kinds.

Sole Corporation.

Aggregate Corporation.

Lay and Ecclesiastical Corporations.

Civil Corporations.

Eleemosynary Corporations.

Ecclesiastical Corporations.

698. Created by the Queen.

One Corporation not to be made by another.

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699. True Description of a Corporation necessary.

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708. Effect of a Grant to a Corporation.

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714. Acts and Powers of Corporations.

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725. Other Cases of Mandamus,&c.

726. Remedies in other Cases. In Equity.

727. Mode of dissolving Corporations. Forfeiture.

(c) F. N. B. 104, A.

(d) Mosley v. Chadwick, 7 B. & C. 474 a; and Mosley v. Walker. see ante, § 691, 692.

(e) R. v. Cotterill, 1 B. & Ad. 67.

(f) R. v. Marsden, 3 Burr. 1812; S. C., Bl. 579.

(g) Reading v. Winkworth, 5 Price, 473; Norfolk (Duke) v. Myers, 4 Madd. 83.

*§ 696. The subject of corporations as a franchise comprehends the following points:— [*541]

1. The nature of a corporation, and its different kinds.
2. How created.
3. Incidents to a corporation.
4. How visited.
5. How dissolved.

1. *The Nature of a Corporation, and the different Kinds.*

697. A. corporation is a body to take in succession, framed as to that capacity by policy, and therefore called by Littleton (sect. 413) a body politic; and is called a body corporate, because the persons are made into a body, and are of capacity to take and grant, &c.(h)

Of corporations some are sole and some aggregate; a sole corporation consists of one person only, as the queen;(i) so, a clergyman, by being made a bishop, prebendary, parson, or vicar, is said to be a sole corporation.(k)

A corporation aggregate is an artificial body of men composed of divers constituent members, and is said to be invisible and immortal.(l)

Corporations are either lay or ecclesiastical: lay corporations are either civil or eleemosynary; the civil are erected for different temporal purposes,(1) thus the queen is a corporation to prevent in general the possibility of an *interregnum*, or vacancy of the throne, and to preserve the possessions of the Crown entire, for immediately upon the demise of one king, his successor is in full possession of the regal rights and dignity;(m) so, the chamberlain of London.(n) Of other lay corporations some are for general government, as those of mayor and commonalty, &c.; some for a commercial purpose, as the Trinity House for regulating the navigation; *so, for the advancement of learning, as the universities, which last [*542] it has been held must be ranked among the lay corporations.(o)

Of the eleemosynary sort are such as are constituted for the perpetual distribution of the free alms as directed by the founder; of this kind are all hospitals for the maintenance of the sick and poor and impotent, and all

(h) 1 Inst. 250, a.

(i) 10 Co. 29 b; 1 Roll. Abr. 512.

(k) Comp. Incumb. 372.

(l) 1 Inst. 130; 2 Bulst. 233.

(m) 1 Comm. 470.

(n) Fulwood's case, 4 Co. 65.

(o) 3 Burr. 1656; 1 Bl. 547.

(1) The distinction between public and private corporations is of greater consequence here in consequence of the provision of the Constitution of the United States forbidding a state to impair the obligation of contracts, which has been held in *Dartmouth v. Woodward*, 4 Wheat. 518, to extend to charters granted by the king before the revolution. It was said in that case by Marshall, C. J. "If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the state of New Hampshire be alone interested in its transactions, the subject is one on which the legislature may act according to its judgment unrestrained by any limitation of its power imposed by the Constitution of the United States." But neither the act of incorporation, nor the public character of the object, education, took from the corporation its character of a private eleemosynary institution. The same distinction is stated by Mr. Justice Story in the same case. See also *Bonaparte v. Camden*, 1 Bald. 222-3. *The People v. Morris*, 13 Wend. 323. *Marietta v. Fearing*, 4 Ohio Rep. 432. *Terrett v. Taylor*, 9 Cranch, 43.

colleges both in the universities and out of them ;(1) and these eleemosynary corporations are, strictly speaking, lay, even although composed of ecclesiastical persons, and although in some respects they partake of the nature, privileges, and restrictions of ecclesiastical bodies ;(p) they are, in fact, lay corporations, because they are not subject to the jurisdiction of the ecclesiastical courts, or to the visitation of the ordinary or diocesan in their spiritual character.(q)

Ecclesiastical corporations are where the members that compose them are entirely spiritual persons, such as bishops, certain deans and prebendaries, all archdeacons, parsons, and vicars, which, as they hold their possessions singly, are sole corporations ; and deans and chapters, which are corporations aggregate ; and if a person who is a corporation sole, makes with others a chapter, as by being an incumbent of the same preferment, he becomes both a corporation sole and a member of a corporation aggregate.(r)

2. How created.

698. The queen by virtue of her prerogative is the only person that can erect either an ecclesiastical or lay corporation,(s) for the pope could not have founded or incorporated a college, &c., here, but it ought to have been done by the king himself ;(t) and although one corporation may be made [*543] out of another, yet it must be by the queen's charter,(2) therefore, *where the mayor and commonalty of London prescribed to make another corporation in the city, though their customs are confirmed, yet it was held not to be good without the king's charter.(u)

In the case of *Cuddon v. Eastwick*,(x) it is said, that a corporation may make a fraternity ; but in other reports of that case the point is not noticed,(y) and it is denied to be law in *R. v. The Coopers' Company, Newcastle*,(z) where it is said, that this can be effected only by the legislature or the Crown ; so, a patent procured by some few persons only shall not bind the rest,(3) nor can the inhabitants of a town be incorporated without the assent of the major part of them ;(a)(4) so, as it is the queen's

(p) 1 *Ld. Raym.* 6.

(q) 1 *Comm.* 471.

(r) *Compl. Incumb.* 372.

(s) 1 *Comm.* 472.

(t) 4 *Co.* 107 b ; *Cawdry's case*, 5 *Co.* 26.

(u) 10 *Co.* 31 ; *Moor*, 584 ; 1 *Sid.* 291.

(x) 1 *Salk.* 192.

(y) 6 *Mod.* 123 ; *Holt*, 433.

(z) 7 *T. R.* 548.

(a) 2 *Brownl.* 100.

(1) *Dartmouth College v. Woodward*, 4 *Wheat.* 518.

(2) But it will not be a successor. *Dillingham v. Snow*, 5 *Mass.* 554.

(3) But the persons named constitute a corporation though the others do not join. *Day v. Stetson*, 8 *Greenl.* 371.

(4) These corporations being entirely within the sovereign power, ante 541, n. 1, *Bradford v. Carey*, 5 *Greenl.* 312, may be created and modified at discretion, but all persons within the limits of a public corporation are subject to such bye-laws as it may lawfully make. *Marietta v. Fearing*, 4 *Ham.* 431. And residing there become ipso facto members of the corporation. *Lord v. Chamberlain*, 2 *Greenl.* 69. Legal settlement is gained by any resident within the limits of a newly created or divided corporation. *Westport v. Dartmouth*, 10 *Mass.* 312 ; and public property of a former corporation divided into two bodies is subject to the same rule and belongs to the body within whose limits it may be situated. *Hempstead v. Hempstead*, 2 *Wend.* 109.

In the case of private corporations, no one can be made a member without his assent. *Gray v. Portland Bank*, 3 *Mass.* 387. *Ellis v. Marshall*, 2 *id.* 279. *Commonwealth v. Jarrett*, 7 *S. & R.* 460. *Bealy v. Knowler*, 4 *Pet.* 167. So the corporation cannot be

charter that creates corporations, no such charter may mould and frame them as it shall think fit.(b)

Some corporations may be by prescription, yet such prescription always supposes an original grant from the Crown, which being lost or worn out by time, yet having run into a prescription, still continues to unite them.(c)

It is now settled that a corporation can only be created by the Crown, or by Act of Parliament;(d) yet the queen may give power to a common person to name the corporation, and the persons it is to consist of; but when he hath so done, this corporation does not take its essence from the common person, but from the queen;(e) so, by the 39 El. c. 5, every person seised in fee simple, may, by deed enrolled in Chancery, erect an hospital or house of correction which shall be incorporated, and have perpetual succession, and shall be visited by such persons as shall be nominated by the founders thereof, &c.(f)

*In creating a corporation, it does not appear that the law requires any set form of words; any words equivalent will suffice, as "*con-stituimus* the men of such a town a corporation," viz. a mayor, &c.:(g)(1) and of ancient time, the inhabitants of a town were incorporated when the king granted to them to have *guildham mercatoriam*.(h)

3. Naming of Corporations.

699. The names of corporations are given of necessity, for the name is, as it were, the very being of their constitution, or, which is the same thing, the knot of their combination, without which they cannot perform any corporate acts,(i) for the name of a corporation is as the name of baptism;(k) but, though a corporation must have a name, yet that must be understood to be expressed in the patent, or implied in the nature of the thing,(l) as if the queen should incorporate the inhabitants of Dale, with power to choose a mayor annually, though no name be given, yet it is a good corporation by the name of the mayor and commonalty, and by that name it shall sue and

(b) 10 Co. 39. (c) 45 E. 3. 2, 3; 1 Inst. 130; 2 Bulst. 233.

(d) Keilw. 138; R. v. The Coopers' Comp., Newcastle, 7 T. R. 543.

(e) Case of Sutton's Hospital, 10 Co. 33.

(f) 2 Inst. 720; see also as to the statutory provisions respecting corporations, Dig. P. i. ii.

(g) 2 Roll. Abr. 197.

(h) Reg. 219; 10 Co. 30. (i) 5 Ed. 4. 201.

(k) 2 Inst. 666; see also Perk. 8; Hob. 32; Leon. 307; Ow. 35.

(l) 1 Salk. 191, pl. 3.

divided without their assent. *Indiana v. Phillips*, 2 Penna. 186. But in all those charters created for public purposes their rights and duties may be modified with their assent. 9 Cranch, 52. *Gray v. Monongahela*, 2 W. & S. 161. *Irvine v. The Turnpike*, 2 Penna. 463. And this assent must be expressed by a majority of the different classes composing the corporation. *Case of St. Mary's Church*, 7 S. & R. 523. And may be shown by acts of the party. *Lincoln v. Richardson*, 1 Greenl. 81. *Beatty v. Knowler*, 4 Pet. 168. *Trott v. Warren*, 2 Fairf. 227. *Russell v. McLellan*, 14 Pick. 63.

(1) *Danton v. Jackson*, 2 J. C. R. 325. And as there may be corporations for particular purposes or to a certain degree, or quasi corporations, so under grants by the sovereign power of such corporate powers, or where incidental to other grants, as of land, the grantees will be considered corporations so as to entitle them to sue as such. *North Hempstead v. Hempstead*, 2 Wend. 131. *The Inhabitants v. Wood*, 13 Mass. 193. *Stebbins v. Jennings*, 10 Pick. 188. *The Society v. Pawlet*, 4 Pet. 480.

be sued, or do all legal acts; *(l)* and although in legal proceedings, any variation from the true name of the corporation has been held fatal, *(m)* particularly where such variation prejudicially affected the rights of parties, yet, where by statute a special authority was delegated to a corporation, affecting the property of individuals, held, that the mayor, aldermen, and commons, in common council assembled, were not sufficiently described by the "mayor and commonalty, and citizens;" *(n)* but a very minute variation therein is not material, *(o)* *(1)* particularly where the strict construction would work an injustice; therefore, where a corporation, describing themselves as the warden, &c., *but omitting the name of their founder, [**545*] by deed, under their common seal, and under the authority of an Act of Parliament, sold part of their estate, it was held, that the misdescription of the corporation, in omitting the name of their founder was immaterial, and that the grant made by the corporation was not void by reason of such misdescription. *(p)*

700. A corporation may change its name, as corporations frequently do in new charters, and will still retain its powers, rights, and privileges, *(q)* and the corporation shall retain under its new name the possessions which it had before, *(r)* and shall recover by its new name a debt owing to it before, *(s)* notwithstanding there have been judgment of ouster against individual members of the corporation, for the corporation is not thereby dissolved. *(t)* On the other hand it shall be subject to bonds, annuities, &c., as before; *(u)* but a distinction has been taken where the new charter alters the constitution of the corporation, and new models it, there they shall lose their old names; but if the constitution remains as to all its integral parts the same, though the new charter gives them a new name, the old one remains, as if a mayor be added, or a mayor and master be made mayor and alderman, or an abbot and convent a dean and chapter, there they lose their old names, because new integral parts of the corporation are added; therefore, where an action of debt was brought against a corporation under its old name, the plaintiffs were nonsuited; *(x)* but a corporation may have two names, one by prescription and one by grant; *(x)* so, a corporation may be

(l) 1 Salk. 191, pl. 3.

(m) Turvill v. Aynsworth, 2 Stra. 787; S. C., 2 Ld. Raym. 1515.

(n) R. v. Croke, Cowp. 26. *(o)* 10 Co. 125; 11 Co. 21; Gouldsb. 122.

(p) Croydon Hospital (Warden, &c.) v. Farley, 2 Marsh. 174.

(q) Dy. 279; Bro. Corporation, 33; Luttrell's case, 4 Co. 87 b; Moor, 581; 1 Vent. 355.

(r) 1 Roll. Abr. 512, pl. 3.

(s) Moor, sup.; Scarborough (Mayor, &c.) v. Butler, 3 Lev. 238.

(t) Colchester (Mayor) v. Seaber, 3 Burr. 1866.

(u) Bro. Corporation, 3; Moor, sup.; Colchester (Mayor) v. Seaber, sup.

(x) Knight v. Wells (Mayor, &c.), 1 Lord Raym. 80; S. C., 1 Lutw. 508.

(1) A distinction is taken between suits by or against a corporation in which the name must be strictly set out and grants and contracts by or to them, in which latter case an averment and proof of identity is sufficient. Road Company v. Creegar, 5 Harr. & Johns. 124. And it is said this laxity was allowed when the strict rule requiring a corporation to speak under its corporate seal alone, was modified. Berks v. Myers, 6 S. & R. 17. See also Minot v. Curtis, 7 Mass. 444. Medway v. Adams, 10 id. 367. Inhabitants v. String, 5 Halst. 323. Clarke v. Potter, 1 Barr. 162. First Parish v. Cole, 3 Pick. 236. Burnham v. Baule, 5 N. H. 449. Soubegan v. McConike, 7 id. 316. Pendleton v. The Bank. 1 Monr. 176.

*incorporated by one name, and power may be given by them to sue and purchase lands by another name;(y) so, where a corporation declaring in covenant by their modern name, stated that the citizens, &c. were from time immemorial incorporated by divers names of incorporation, and at the time of making the indenture by A. B., which they declared on, were known by a certain other name, by which name A. B. granted them a certain water-course, and covenanted for quiet enjoyment, held, that the deed granting the water-course to them by such name was evidence as against the defendants who claimed under the grantor, that the corporation was known by that name at the time, upon an issue taken upon that fact.(z)

Where a corporation takes its rise from the queen's charter, the queen, by granting and the corporation by accepting another charter, may alter the name, because it is done with the consent of all the parties, who are competent to consent to the alteration;(a)(1) but the constitution of a corporation as settled by Act of Parliament, cannot be varied by the acceptance of any charter inconsistent with it.(a)

4. Incidents to a Corporation.

701. When a corporation is duly created all incidents as to purchase and grant,(2) to sue and be sued, &c., are tacitly annexed to it, and although no power to make laws, statutes, or ordinances is given by a special clause to a corporation, it is included by law in the very act of incorporation, but their by-laws ought always to be subject to the laws of the realm, as subordinate thereto.(b)(3)

Corporations have also as incident to them a common seal, for a corporation being an invisible body cannot manifest *its intention by any personal act or oral discourse, it therefore acts and speaks only by [*547] its common seal.(c)

Aggregate corporations have also a power necessarily implied of electing members in the room of such as go off;(d) and a prescriptive right in persons of a definite description to be admitted burgesses of Nottingham was held by the court not to exclude the incidental power arising by implication of law to the corporation at large, to secure their perpetual succession by voluntary elections of burgesses *ad libitum*.(e)

Formerly it was held that a power of removing its members was not incident to a corporation, and that no freeman of any corporation could be dis-

(y) College of Physicians and Butler, W. Jo. 261; S. C., Litt. Rep. 168; Cro. Car. 256; see also College of Physicians v. Salomon, 2 Salk. 452; S. C., 1 Ld. Raym. 630.

(z) Carlisle (Mayor, &c.) v. Blamire, 8 East, 487.

(a) R. v. Miller, 6 T. R. 268.

(b) Case of Sutton's Hospital, 10 Co. 30; Norris v. Staps, Hob. 211; The City of London v. Vanaere, 5 Mod. 438.

(c) Dav. 44, 48.

(d) 1 Roll. Abr. 514; 1 Comm. 475.

(e) R. v. Bird, 13 East, 367.

(1) Ante 543, n.

(2) Bank of the U. S. v. Dandridge, 12 Wheat. 64. Reynolds v. Stark Co. 5 Ham. 205. First Parish v. Sutton, 3 Pick. 239. Rumford v. Wood, 13 Mass. 198. McCartee v. Orphan Asylum, 9 Cow. 508. The right to hold depends on the mortmain acts. Leazure v. Hillegas, 7 S. & R. 320.

(3) Marietta v. Fearing, 4 Ham. 431.

franchised by the corporation, unless they had authority by the express words of the grant, or by prescription, (*f*) but in *Teddersley's case* (*g*) it was held, that reasonable cause ought to be shown, and in *Lord Bruce's case* (*h*) it is said, that in modern times the opinion has been, that a power of amotion is incident to a corporation. (*i*) (1)

Corporations have also many of the franchises already mentioned but these must be mentioned in the charter and granted by express words; (*k*) and they may claim by prescription as natural persons; (*l*) but the corporation of a town cannot prescribe for the freeholders of the town. (*m*)

5. *How a Corporation differs from natural Persons.*

702. The points of difference between corporations and natural persons, relate to—

1. Modes of proceeding by corporations.
- [*548] *2. Grants made by or to corporations.
3. How corporations may sue or be sued.
4. Liabilities of corporations.
5. Acts and powers of corporations.

703. A corporation aggregate can do nothing but by attorney; (*n*) it ought to appear by attorney, for if all appear in person, it is not sufficient; (*o*) so it ought to acknowledge a deed by attorney; (*p*) and any natural person may be an attorney for a corporation, though he be a member of the same corporation; (*q*) so, if a corporation make a lease, it must afterwards make an attorney to enter and deliver the lease; (*q*) so, to avoid a lease for non-payment of rent, it ought to make an attorney to enter *de novo*; (*r*) but a dean and chapter, in their chapter-house, acknowledged a deed of grant of their lands to the king without making an attorney, and it was held, that it might be well done; (*s*) so, to put their common seal to a deed without attorney. (*s*)

704. So, aggregate corporations, consisting of a constant succession, can regularly do no act without writing, therefore gifts to and by them must be by deed; (*t*) so, a corporation aggregate cannot, without deed, command their bailiff to enter into certain lands of their lessee for years, for a condition broken; (*u*) nor to enter for a forfeiture, nor to enter into lands pur-

(*f*) *Bagg's case*, 11 Co. 99 a; *Yates's case*, Sty. 477; *R. v. Coventry (Mayor, &c.)*, 1 Ld. Raym. 392; *R. v. Doncaster (Mayor, &c.)* 2 Ld. Raym. 1566.

(*g*) 1 Sid. 14. (*h*) 2 Str. 819.

(*i*) See also *R. v. Richardson*, 1 Burr. 517.

(*k*) 39 Ed. 3. 35; 19 H. 6. 52; 14 H. 8. 5; *Sheriff of Canterbury*, 1 Keb. 840.

(*l*) 1 Ld. Raym. 113.

(*m*) 2 Keb. 2.

(*n*) 1 Inst. 66, b.

(*o*) *Bro. Corporation*, 23.

(*p*) 1 Leon. 184; *Moor*, 591.

(*q*) *Bro. Corporation*, 4.

(*r*) 1 Ventr. 257.

(*s*) *Anon.*, *Skin.* 413.

(*t*) *Moor*, 676.

(*u*) 1 Inst. 94. b.; 6 Co. 38; *Cro. Car.* 170; 2 *Saund.* 305.

(*v*) *Dumper v. Syms*, *Cro. El.* 815.

(1) *Commonwealth v. St. Patrick's Society*, 2 Binn. 448. *Id. v. Guardians of the Poor*, 6 S. & R. 469.

chased;(x) so, not to make livery of seisin;(y) so, not to accept an assignee of a lease as tenant.(z)(1)

So, if a lease for years be made to a corporation aggregate, they cannot make an actual surrender without deed;(a) *but if they accept a new lease thereof, this is a surrender of their first lease in law.(b) [*549]

But a corporation may employ one in ordinary services without deed, as a butler, cook, &c., but not to appear for them in any thing which concerns their interest or title;(c) so, to make a distress, for this does not vest or divest any interest;(d) so, a man may avow taking cattle *damage feasant*, as bailiff to a corporation, without having a precept in writing;(e) so, a verbal notice to quit, given by the steward of a corporation, will be sufficient;(f) so, where the churchwardens of S. were incorporated, and the king leased to them for twenty years, and, in consideration of a surrender thereof, leased to them for fifty years, held, that they might with their own hands, and without writing, deliver the first letters-patent into Chancery to be cancelled.(g)

705. Regularly, as a corporation can manifest its intention only by the help of a common seal, all its acts ought to be under seal; therefore, where a corporation, by a verbal agreement with a pauper, leased to him the tolls of a market for above 10*l.* a year, it was held that he could not gain a settlement thereby, as no interest could pass from a corporation but under the common seal;(h) but in equity it has been held not necessary that every such act should be under seal;(i) so, though the affixing of the common seal to the deed of conveyance of a corporation be sufficient to pass the estate without a formal delivery, if done with that intent, yet it will have no such effect if the order for affixing the seal be accompanied with a direc-

(x) Bro. Corporation, 50; 1 Leon. 30; Predyman v. Wodry, Cro. Jac. 110.

(y) Throckmorton v. Tracey, Plow. 149.

(z) Dean and Chapter of Windsor v. Gover, 2 Saund. 305; S. C. Anon., 1 Vent. 98; S. C. nom. Windsor (Dean, &c.) v. Gower; T. Raym. 194.

(a) 10 Co. 63. (b) 10 Co. 68.

(c) 1 Vent. 47; 1 Mod. 18.

(d) Anon. 1 Salk. 191.

(e) Manby v. Long, 3 Lev. 107.

(f) Roe v. Pierce, 2 Campb. 96.

(g) 10 Co. 63.

(h) R. v. Chipping Norton (Inhabs.) 5 East, 239.

(i) Att.-Gen. v. Davy, 2 Atk. 212; Att.-Gen. v. Scott, 1 Ves. 413; and Maxwell v. Dulwich College, Fonb. Treat. Eq. 306; but see Taylor v. Dulwich College, 1 P. Wms. 655.

(1) Parol agreement to rescind a policy of insurance not sufficient, as the charter directs the mode of evidencing the contract; and this rather shows the terms on which the contract could be made; Head v. The Providence Ins. Co. 2 Cranch, 127. But now a corporation may appoint an agent even without writing; Union Bank v. Ridgley, 1 Harr. & Gill, 420; or his acts may be presumed authorized from similar ones having been recognized, Life Ins. Co. v. The Mechanic Ins. Co. 7 Wend. 32. So a vote of the corporators of a town held sufficient to pass the title. Inhabitants v. Wood, 13 Mass. 199.

The old rule is inapplicable to acts and votes passed at corporate meetings; and the corporation may be bound by a promise express or implied resulting from the acts of its agents, even though not appointed under the corporate seal but by a corporate vote. B. U. S. v. Dandridge, 12 Wheat. 64; and see Bank of Columbia v. Patterson, 7 Cranch, 299, where the subject is fully considered. Mott v. Hicks, 1 Cow. 513; Fleckner v. Bank of U. S., 8 Wheat. 338; Danforth v. Schoharie Turnpike Co. 12 Johns. 227; Canal Bridge v. Gordon, 1 Pick. 297; Abbott v. Herman, 7 Greenl. 118; Kennedy v. The Insurance Co., 3 Harr. & Johns. 370; Trustees v. Mulford, 3 Halst. 182; Chestnut v. Rutter, 4 S. & R. 16 The Banks v. Poiteux, 3 Rand. 136; Buncombe v. McCarson, 1 Dev. & Bat. 306.

tion to retain the conveyance in his hands, until accounts were adjusted with the *purchaser; (j) so, in ejectment, the plaintiff declared upon [*550] a demise, made to him by the aldermen and burgesses of —, without setting forth that it was by deed or under the seal of the corporation, and on a writ of error this was holden well, for this being a fictitious action to try the title, the demise need not now be set out to have been by deed; (k) so, if a *mandamus* be directed to the Mayor, &c. of T., the return may be made in the name of the corporation without the common seal or the hand of the mayor set to it, for though a corporation cannot do an act *in pais* without their common seal, yet they may do an act upon record, by which they are estopped to say it is not their act; (l) but the seal of a corporation, put to a deed by a person who is not mayor, does not make it the deed of the corporation. (m)

706. Although it is incident to every corporation to have a capacity to purchase lands for themselves and successors, (n) yet this rule admits of several exceptions and qualifications. A dean without the chapter, a mayor without his commonalty, the master of a college or hospital without his fellows, cannot purchase or make any contract that will bind the corporation; (o) so, *e converso*, a bond or contract entered into by the body in the absence of the head, will not bind; and upon this principle, if a bond be extorted from a mayor and commonalty by the imprisonment of the mayor, the corporation may plead that imprisonment in avoidance of the bond, for, during the imprisonment, the corporation may be considered without a head; (p) so, a devise to a college by the master is void, for it has not a head when the devise takes effect; (q) *sed secus*, if there be a head when the grant takes effect, as, a lease to A. for life, remainder to a mayor and [*551] commonalty, made in a vacation, *shall be a good remainder if there be a mayor when A. dies; (r) so, a grant of liberties or franchises in the time of vacation, as a grant to a commonalty to be incorporated and choose a mayor; (s) so, payment of rent may be made to a chapter in vacation. (t)

707. Corporations were excepted out of the Statute of Wills, 34 H. 8, c. 5, so that no devise of lands to a corporation was good except for charitable uses, under the 43 El. c. 4; and although that act is repealed, and this clause is not re-enacted by the last Will Act, 7 W. 4 & 1 V. c. 26, yet the 9 G. 2, c. 36, (see Dig. P. iii. tit. Mortmain,) has imposed many restrictions on bequests and devises to corporations, as well as others for charitable purposes; and as to gifts *inter vivos*, several statutes from Magna Charta, 9 H. 3, c. 36, to 9 G. 2, c. 36, known by the name of Mortmain Acts, (see Dig. sup.) have abridged the power of purchasing by corporations, so that now a corporation, whether ecclesiastical or lay, must have a license from the Crown before they can exercise the privilege of purchasing, which is otherwise incident to them at common law. By some statutes, however,

(j) *Derby Canal v. Wilmot*, 9 East, 360.

(k) *Patrick v. Balls*, Carth. 390.

(i) Salk. 192; see *Skinn.* 154.

(m) 12 Mod. 423.

(n) 10 Co. 30.

(o) 21 E. 4, 12; *Moor*, 51.

(p) 21 E. 4, 12, recognised in *R. v. Carter*, Cowp. 224.

(q) *President of C. C. College case*, 4 Leon. 223.

(r) 1 Inst. 264 a.

(s) 10 Co. 27.

(t) *Moor*, 52.

corporations are enabled to take lands, &c. given to them for particular purposes, as by the 43 G. 3, c. 107, the governors of Queen Anne's bounty may, notwithstanding the Statutes of Mortmain, take lands, &c. bequeathed to them, and by the 45 G. 3, c. 34, personal property may be given to this charity without deed. So, by the 43 G. 3, c. 108, and other acts for the repairing and building of churches, (see Dig. P. ii. tit. Church,) it is provided that lands not exceeding five acres may be given for the purpose of providing houses of residence for the minister, churchyards, and glebe, &c., and a similar exception is to be found in other statutes, see Dig. P. i. tit. Disabilities.

*708. If a feoffment or grant be made by deed to a corporation aggregate, which consists of persons all capable, it will give them a [*552] fee simple without the word "successors;" (u) so, if the head only is capable, as a gift to a prior and convent, &c., where it is given in frankalmoigne; (u) so, if a lease be made to a corporation aggregate for the life of the lessor, this is a good estate for life, because the life of the lessor, which is wearing and will determine, is the measure of its continuance; but if a lease be made to a corporation aggregate for their own lives, this is no estate for life, but a fee simple; for the lease being made to them as a body politic, which hath a continued succession and never dies, it shall be good forever, and the words "for life" shall be rejected; (x) so, a corporation aggregate may take any chattel, as bonds, leases, &c., in its political capacity, which shall go in succession, because it is always in being; (y) so, if a master of an hospital recovers arrears of an annuity and dies, they go to the hospital and not to the executor of the master; (z) so, if the President of the College of Physicians recovers in debt, for malpractice, the successor, and not his executor, shall have a *scire facias*; (z) so, by special custom, a corporation sole may take goods, &c. in succession, as the chamberlain of London, (a) although regularly no chattel in possession, or action granted or made to a corporation sole, goes in succession, but it will go to his executors; (b) so, not even if granted to him and his successors; (c) therefore, if a lease for years be made to a bishop and his successors, this will not go to his successors, but to his executors, (d) but the ancient jewels of the Crown go to the successor, and are not devisable by testament, (e) although it has been said that they may be disposed of by *patent; (e) so, the ornaments of the chapel belong to the successor of a bishop; (f) so, a feoffment, [*553] grant, &c. to a corporation sole, will not give a fee in succession, unless it be limited to him and his successors; (g) so, a corporation cannot be seised to the use of another, therefore it was said, that if one by license, without a valuable consideration, made a feoffment, levied a fine, or suffered a recovery, or the like to a corporation, to the use of J. S., the corporation should have it to their own use; (h) but corporations may be, and in point of fact are, made trustees. (i)

(u) 1 Inst. 9, b., 94, b.

(y) Ib.; 1 Inst. 46, b.; 1 Roll. Abr. 515.

(a) Fulwood's case, 4 Co. 65 a; Byrd v. Wilford, Cro. El. 464; see also Dy. 48; Hob.

64. (b) Fulwood's case, sup.

(c) Dy. 48.

(d) 1 Inst. 46.

(e) Id. 18, b.

(e) Lord Hastings v. Douglas, Cro. Car. 344.

(f) 12 Co. 105.

(g) 1 Inst. 94.

(h) Plow. 102; Jenk. 195.

(i) Gilb. Uses, 5, 170.

709. So, a corporation has an incident power to make an alienation of their lands or goods, either for life or years, and if under their common seal it shall bind their successors; *(k)*(1) and although they alien all their goods and possessions, yet the corporation continues; *(l)*(1) but an alienation by the head, without the body, is a disseisin; *(m)* so, a corporation can convey by bargain and sale, for they may give a use, although they cannot stand seised to a use; *(n)* and as to the restrictions imposed on ecclesiastical corporations by the disabling statutes, see Dig. iii. tit. Leases.

710. Although the power of suing and being sued is incident to a corporation, yet it is not precisely the same as with natural persons, for a corporation must sue and defend by attorney; *(o)* and as to the name by which they must sue and defend, see ante, §§ 699, 700; also, as to the statutory provisions, Dig. P. i. ii. tit. Companies, Corporations.

No attachment lies against a corporation, *(p)* but they may be compelled [*554] to appear by fine and distringas; *(q)* yet, *if they have no lands nor goods, there is no way to compel appearance either in a court of law or equity, for it is a rule, that for a public concern the sheriff cannot distrain any individual member of a corporation; *(r)* but in an extraordinary case, where they have no property and will not appear, and when consequently a court of equity can give no relief, the plaintiff may apply to the House of Lords, who will make a specific order for relief. *(s)* The summons to appear must be served on the mayor or other chief officer, and that is sufficient. *(t)*

A corporation aggregate cannot distrain in their own persons, but by their bailiff, and therefore no replevin lies against them by the name of their corporation; *(u)* so, it cannot sue as a common informer. *(x)* An action for a false return will lie against a corporation having the return of writs, or to which any writ is directed; *(y)* so, *quare impedit*; *(z)* so, trover; *(a)* and although it was said, that a corporation cannot be excommunicate, *(b)* yet they may be made amenable to the ecclesiastical courts, and may be cited by their proper names, as there is no other way, though in their politic capacity, and if they stand out, they may be punished in their natural capacity. *(c)*

(k) 1 Sid. 162.

(l) W. Jo. 168.

(m) 1 Inst. 341.

(n) Holland v. Boines, 2 Leon. 122; Com. Dig. tit. Bargain and Sale.

(o) 1 Inst. 66.

(p) T. Raym. 152.

(q) 1 H. Bl. 209.

(r) Case of the City of London, 1 Vent. 351; Thursfield and Jones, Skinn. 27.

(s) 1 Ch. Ca. 204; 2 Vern. 396.

(t) Ib.; see also Prec. Cha. 131.

(u) Brownl. 175.

(x) 2 Str. 1241, marg.

(y) Argent v. Dean and Chapter of St. Paul's, 16 East, 8.

(z) Butler v. Hereford (Bp., &c.), Barnes, 350.

(a) Yarborough v. Bank (Engl.), 16 East, 6.

(b) 10 Co. 32 b.

(c) Thursfield and Jones, Master, &c., of the Company of Wax-chandlers, Skinn. 27.

(1) State of Maryland v. Bank of Maryland, 6 Gill & Johns. 216. Union Bank v. Ellicott, id. 363. Pope v. Brandon, 2 Stewt. 404. Catlin v. The Eagle Bank, 6 Conn. 231. Revere v. The Boston Copper Company, 15 Pick. 351. Dana v. The Bank of the United States, 5 W. & Serg. 223. Wilde v. Jenkins, 4 Paig. Ch. Rep. 481. The rule laid down in Slee v. Bloom, 19 Johns. 475, that suffering an act to be done, which destroys the end and object for which the corporation was instituted, must be regarded as equivalent to surrender and dissolution, is by subsequent decision confined to the peculiar question then before the Court, viz., Whether the corporation could not be considered dissolved for the purpose of sustaining an action by the creditors against the individual members given by the charter. Briggs v. Penniman, 1 Hopk. Ch. Rep. 301. 8 Cow. 337. Bank of Niagara v. Johnson, 8 Wend. 654.

711. In an action, of whatsoever kind, brought by a corporation, it is unnecessary to show how they were incorporated; but on the general issue pleaded by the defendant, it is said, that they must prove that; *(d)* (1) so, as an action may be supported in this country, by a foreign corporation, in their corporate name and capacity, and it is sufficient if, *on the general issue being pleaded, they prove that by the law of the foreign country, [*555] they were effectually created a corporation. *(e)* (2) But in justifying a trespass in the assertion of a privilege or franchise of a corporation, it is necessary to show not only the existence of the corporation, but the manner in which it claims to be so, whether by charter, prescription, or Act of Parliament. *(f)*

A sole corporation having two capacities, natural and corporate, must always shew in what right he sues; *(g)* but an aggregate corporation having only a corporate capacity, a suit in their corporate name can be only in that capacity; therefore, it is not necessary that a mayor and commonalty should allege seisin in right of the corporation, *(h)* or a warden and scholars should allege seisin in right of their college. *(i)*

In equity corporations answer under their common seal and not upon oath, but it having been found that they would answer nothing to their prejudice, the Court have ordered that the clerk of the company, and such principal members as the plaintiff thinks fit, should answer upon oath. *(k)* Sometimes where a discovery is necessary before a plaintiff can bring his action against a corporation, a bill may be filed against the corporation and their secretary or principal officer for this purpose; but in that case, if any of the matters called for would be prejudicial to the corporation, and not necessary to the plaintiff's case, the officer will not be compelled to discover such parts. *(l)* If the majority of the members of a corporation are ready to put in their answer, and the head, who has the custody of the common seal, refuses to affix it to the answer, a court of equity *will stay the process against the corporation until an application can be made to the Court of Queen's Bench for a *mandamus* to compel him, which that court will grant. *(m)* [*556]

Before the 3 & 4 W. 4, c. 27, s. 29, (see Dig. P. iii. tit. Limitations,) ecclesiastical corporations were not within any of the Statutes of Limitations

(d) Hob. 211.

(e) Dutch West India Company v. Henriques van Moyses, 2 Ld. Raym. 1535; S. C., 1 Str. 612.

(g) Dy. 102; Plow. 162.

(f) Pitts v. Gainer, 1 Ld. Raym. 558.

(i) Cro. El. 232; 1 Andr. 272.

(h) 1 Leon. 153.

(k) Anon., 1 Vern. 117; Wych v. Meal, 3 P. Wms. 310; see also Fenton v. Hughes, 7 Ves. 289; Dummer v. The Corporation of Chippenham, 14 Ves. 244; Mitf. Eq. P. C. 153.

(l) Moodley v. Morton, 1 B. C. C. 471.

(m) R. v. Dr. Wyndham, Cowp. 377.

(1) Such proof is required on the general issue being pleaded. *Agnew v. The Bank, 2 Harr. & Gill, 493. Carlile v. Bates, 8 Johns. 378. Dutchess v. Davis, 14 Johns. 245. Bank v. Weed, 19 id. 300. United States Bank v. Stearns, 15 Wend. 314. Reese v. Conococheague, 5 Rand. 329.*

Contra, Holding such plea an admission of the fact. *Monumoi v. Rogers, 1 Mass. 164. Wittington v. The Farmers' Bank, 5 Har. & Johns. 493; but this was created by a public law of the state where the suit was brought. Methodist Church v. Wood, 5 Ham. 286. Conard v. The Atlantic Ins. Co., 1 Peters, 450. The Society v. Pawlet, 4 Pet. 501. Concord v. McIntire, 6 N. Hamp. 527. Taylor v. The Bank, 7 Monr. 584. Boston v. Spooner, 5 Vermont, 93.*

(2) *Bank of Augusta v. Earle, 13 Pet. 519-90.*

then in force, and could not, therefore, bar their successors by neglecting to bring actions for the recovery of their possessions.(n)

712. Corporations, in their character of owners or occupiers of houses or lands, are subject to the same burthens as individuals are subject to in the same character.(1) Having lands or tenements in any shire, and residing in any town corporate, they are said to be inhabitants within the purview of the 22 H. 8, c. 3, for the repair of bridges;(o) so, they are liable to be rated to the poor within the 43 El. c. 2, in respect of lands whereof they are seised in fee for their own profit;(p) so, they are rateable to the repairs of the church;(q) so, they may be bound exclusively to the repair of a highway, bridge, or creek, by reason of tenure, or they may be so compelled by force of a general prescription that they ought and have been used to do so from time immemorial, without an allegation that they used to do so in respect of the tenure of certain lands, or for any other consideration, because a corporation, in judgment of law, never dies; and, therefore, if they were ever bound to such a duty, they must continue to be so always;(r) neither is it any plea that they have done it out of charity, for what they have always done they shall be presumed to have been always bound to do; therefore, if a bishop or prior hath once or twice of alms repaired a bridge, it bindeth not, and [*557] *yet is evidence against him until he prove the contrary, but if time out of mind they and their predecessors have repaired it of alms, this shall bind them to it;(s) and where a party is bound *ratione prescriptionis tantum*, there a distinction has been taken between bodies politic, spiritual, or temporal, and natural persons; for bodies politic may be bound by usage or prescription only, because they are local and have succession perpetual, but a natural person cannot be bound by the act of his ancestor, without a lien or binding and assets.(t)

It is said that it hath not been known, that a corporation hath been bound in a recognizance or statute-merchant;(u) so, a corporation cannot be outlawed;(x) and as to what actions a corporation may be liable to, see ante §§ 710, 711.

713. "As to the remedy of levying a duty upon a corporation, the books all agree that it can be done, though they differ as to the mode."(y) Sheppard, in his Treatise upon Corporations, (cited in R. v. Gardner, Cowp. 85,) says, "If a sum of money be to be levied upon a corporation, it may be levied upon the mayor or chief magistrate, or upon any person being a member of the corporation;" see also Sty. 367; but in the Case of the City

(n) Plow. 358; 11 Co. 78 b; 1 Roll. Rep. 151.

(o) 2 Inst. 703.

(p) R. v. Gardner, Cowp. 79.

(q) Thursfield and Jones, T. Jo. 187.

(r) 1 Hawk. P. C. c. 76, s. 8; Bac. Abr. tit. Corporations, (E. 1); see also Mayor of Lynn v. Turner, Cowp. 87.

(s) Master of Leonard's case, 10 E. 3. 28, 29, cited 2 Inst. 700.

(t) The Prior of Markiat's case, 49 E. 3. 5 b, cited 2 Inst. 700; see also 21 E. 4, pl. 3; R. v. Ecclesfield (Inhabs.), 1 B. & A. 348.

(u) Moor, 68, pl. 182.

(x) 10 Co. 32, b.

(y) Per Aston, J., R. v. Gardner, Cowp. 85.

(1) United States v. Amidy, 11 Wheat. 392. The People v. The Utica Insurance Co., 5 Johns. 358.

of London,(z) it is said, "that for a duty or charge upon a corporation every particular member thereof is not liable, but process ought to go in their public capacity;" and in *R. v. Gardner*,(a) this is held to be the right law, although in *Thursfield and Jones*(b) it is said, "If the company had neither lands nor goods, there was no way to make them appear, yet if they stood out, they must lie by the heels in their natural capacity."(1)

*If a corporation aggregate disseise to the use of another, they are disseisors in their natural capacity, and the persons who committed the wrong shall be charged therewith, and not the corporation, which consisting of a constant succession of various persons, and as a corporation, can regularly do no act without writing;(c) and if a mayor or any other member of a corporation, procure a false return to be made to a *mandamus*, they may be proceeded against in their private capacities;(d) an action, however, cannot be maintained against individuals for acts erroneously done by them in a corporate capacity to the injury of the plaintiff, unless, at least, there be ground to impute malice to them.(e)

In equity the private members of a company have been made liable to the company's debts, where the company had no goods;(f) and as to the liability of the members of joint-stock companies under different statutes, see *Dir. p. ii. tit. Companies*.

714. Where no special provision is made by the constitution of a corporation, the whole are bound by the acts, not only of the major part, but of the major part of those present at a regular corporate meeting, whether the number present be a majority of the whole or not;(g)(2) and so, although a particular constitution require the presence of a majority of the whole number, yet the concurrence and consent of a majority of the whole is not necessary, it is sufficient that a majority of the number present concur;(h) so, where a number less than a majority of the whole are by a particular constitution competent to do a corporate act, the act of a majority of that smaller number is equivalent to the act of the majority of the whole; thus by the constitution of the *City of London, forty are sufficient to form a court of common council, though the number of common councilmen exceeds [559] the double of that number, and a majority of the forty, if no more be pre-

(z) 1 Ventr. 351.

(a) Sup.

(b) Skinn. 27.

(c) Bro. tit. Disseisin, 65; cited Bac. Abr. tit. Disseisin, (B.)

(d) Mayor of Thetford's case, 1 Salk. 192; *R. v. Pilkington*, Carth. 171; *R. v. Rippon*, 1 Ld. Raym. 564.

(e) *Harman v. Tappenden*, 1 East, 555.

(f) 2 Vern. 396.

(g) Cowp. 249.

(h) 2 Burr. 1019.

(1) A distinction is taken between those quasi corporations invested with such powers without their consent, being political in their character, such as towns, counties, hundreds, &c., in which every member is liable to the payment of the debts; against these no action lies unless given by statute; and a proper aggregate corporation, having or being supposed to have a corporate fund, where there is no liability of the individual corporators, unless it be given by the charter. *Riddle v. Proprietors*, 7 Mass. 187. *Commonwealth v. Blue Hill*, 5 Mass. 422. *Marcy v. Clark*, 17 id. 336. *Adams v. Wiscasset Bank*, 1 Greenl. 364. *Merchants' Bank v. Cook*, 4 Pick. 414. *Atwater v. Woodbridge*, 6 Conn. 228.

(2) *Cram v. Bangor*, 3 Fairf. 359. *Revere v. Boston Copper Co.* 15 Pick. 363.

sent, bind the whole corporation.(i) Where a charter requires an act to be done by the major part of a definite body, no corporate assembly can be composed of less than a majority of such definite body, and, consequently, when the number is reduced below that majority, the power of acting is at an end;(k)(1) *sed secus* where the number is indefinite, for there the words "major part" have no operation, and any number of the body, duly assembled, however small, is sufficient to form a corporate assembly.(l)

715. With respect to the concurrence of the head of the corporation, it appears to be a rule that the head is but a member of the acting part, in the same manner as any other member, and without a particular usage or the express provision of a charter, he has no negative voice; therefore, where a power of election is vested in a set number, *quorum* A. and B. to be two, their presence only is required, and not their consent, Cotton and Davies;(m) see also R. v. Blythe,(n) R. v. Sutton,(o) and Serjeant Whitacre's case,(p) in which last case it was held, that, if the actual consent of the bailiffs had been required, their consent should be intended, either as actually given, or as included in that of the majority, for that, as in all corporate acts, the act of the majority is the act of the whole; so, the bailiffs being the head of the corporation, nothing could be done without their presence, though it had not been expressly required, and its being so required did not render their concurrence necessary; *but where the provisions of a charter direct [*560] that the new mayor shall be sworn before his predecessor, the presence only of the latter is not sufficient; there must also be his assent, or at least not his dissent.(q)

So, if the charter says the mayor shall summon a court, and he refuses, it seems that this may be done without him.(r)

716. The necessity of summoning the members, and the mode of so doing, is another point on which the validity of corporate proceedings depends. Where a corporate act, as an election, is to be done not on a charter day, whether to be done by the whole corporation or by a select number, notice of the meeting must be given to all;(2) but where an election is to be at a charter day, fixing a particular day, there a summons is not necessary, for every member is bound to take notice of the day;(s) but where the whole corporation are summoned for a particular purpose, as to receive the resignation of a common councilman, a select body, who are all present and consenting, may, at the same meeting, without any particular

(i) Att.-Gen. v. Day, 2 Atk. 212.

(k) R. v. Newsham, Say. 211; R. v. Varlo, Cowp. 248; R. v. Monday, Id. 530; R. v. Grimes, 5 Burr. 2598; R. v. Bellringer, 4 T. R. 810; R. v. Miller, 6 T. R. 268; R. v. Morris, 4 East, 17.

(l) R. v. Varlo, &c., sup.

(m) 1 Str. 53.

(n) 5 Mod. 404. 421.

(o) 10 Mod. 74.

(p) 2 Ld. Raym. 1233; S. C. nom. R. v. Ipswich (Bailiffs,) 2 Salk. 434.

(q) R. v. Ellis, 2 Str. 994; more fully reported in R. v. Courtenay, 9 East, 252, n.

(r) R. v. Atkins, 3 Mod. 3.

(s) 1 Vez. 416; R. v. Shrewsbury (Mayor,) Ca. temp. Hardw. 151.

(1) Note (a) to 7 Cowen's Rep. 530.

(2) Gordon v. Preston, 1 W. 387. Stow v. Wyse, 7 Conn. 214.

summons to them for that purpose in their select capacity, proceed to the election of a common councilman in the place of the other resigned, the power of election being in the select body, and the charter not requiring any previous summons, *R. v. Theodorick*,^(t) recognising *R. v. Carlisle* (Mayor, &c.),^(u) where, instead of all, only some of the select body were present; also *R. v. Strangways*, cited in *R. v. Shrewsbury*, (Mayor),^(v) in which case it was held that when the acts are to be done by a select number, notice must be given of the time of meeting, and that it is to do some corporate act, though what particular corporate act need not be specified; and in such case the acts of a majority would bind the whole body; or if *all* were present, *though *by accident* and *without notice*, their acts would be good, but the acts of a majority merely in such a case would not [*561] be binding; so, in *R. v. Wake*,^(x) it was held, that wherever notice is given for one particular business, the body cannot go into other business, unless the *whole* body is met, and it is done by consent.

Where a summons is necessary, it is not sufficient that the usual and general orders be given to the summoning officer, the latter must actually do everything he possibly can to summon all the members of the select body;^(y) and it is laid down as a rule, that where there is a usual method of notice, that cannot be dispensed with, though there be actual summons of all the members, unless, indeed, every single member be present at the meeting, and consent to waive it,^(z) but notice to non-residents is not necessary.^(a)

717. Although it is now settled that a power of amotion or disfranchising its members is incident to a corporation,^(b) yet a removal being an act of an odious nature, all clauses concerning it in a charter must receive a strict interpretation; therefore, where a charter empowers a majority to remove a person, held, that the word "majority" should be understood a majority of the whole corporation;^(c) so, in such case a general summons without specifying any particular act for which the meeting is called is not sufficient, it is necessary to mention that it is intended to consider the removal of the particular person;^(d) so, where it is intended to remove any one of the members or officers of a corporation, it is absolutely necessary, not only that he should be summoned generally to attend,⁽¹⁾ but he must have a particular summons to attend, and answer the particular charge alleged *against him;^(e) but under certain circumstances such notice may be dispensed with, as where a man is charged in *plenis comitiis* and [*562] ordered to prepare his defence by such a time, this will be good, though there be no actual summons, because if the party be heard it is sufficient;^(f) but it seems to be doubtful, whether his being charged and answering in the same assembly will cure the want of notice.^(g)

(t) 8 East, 543.

(u) 1 Str. 385.

(v) Sup.

(x) Barnard. 80.

(y) *R. v. Shrewsbury* (Mayor), Ca. temp. Hardw. 147.

(z) *R. v. May*, 5 Burr. 2682.

(a) *R. v. Grimes*, 5 Burr. 2599.

(b) *R. v. Richardson*, 1 Burr. 530; and see ante, § 701. (c) *R. v. Sutton*, 10 Mod. 76.

(d) *R. v. Liverpool* (Mayor), 2 Burr. 723; *R. v. Doncaster* (Mayor, &c.), Id. 733.

(e) *Bagg's case*, 11 Co. 99; *Glyde's case*, 4 Mod. 33, 37.

(f) *R. v. Chalke*, 1 Ld. Raym. 225; S. C., 1 Salk. 42.

(g) *Serjeant Whitaker's case*, 2 Ld. Raym. 1240; S. C. 2 Salk. 435.

(1) *Commonwealth v. Pennsylvania Beneficial Inst.*, 2 S. & R. 141. *Delany v. Neuse*, 1 Hawk. 274.

When a man is removable for non-residence, there is no necessity to summon him, because he is out of the reach of summons;(*h*) but if he be removable for non-attendance at the corporate assembly, he must have had personal notice to attend, and that his presence was necessary, for the usual notice of the intended meeting will not be sufficient, unless that usual notice be personal.(*i*)

A man may be constituted a burgess, or appointed to an office by deed under the common seal, and in that case he ought to be discharged in the same manner, but where the party is constituted or appointed by election, nothing more is required than an entry in the corporation books, and he may be discharged by an order entered in the same manner;(*k*) so, where an office is granted by deed, the resignation or surrender must also be by deed, but where an officer is appointed by election, the corporation may accept his resignation by parol before them;(*l*) as to what may be done by deed or otherwise, see ante, § 704.

718. Regularly, there can be no election but to an office which is actually vacant, for though it may be a practice in some cases to choose a person beforehand, which may be *called an inceptive election, and on the [*563] death of the predecessor to admit the person before nominated, which completes the election, yet such an election is not binding on the electors, and when the vacancy happens they may elect another.(*m*)

If the election of a particular officer be, by ancient charter, vested in one body, a subsequent one cannot of itself alter the mode of election; but if the subsequent charter be accepted by the corporation at large, and they act in conformity to it, and acquiesce, such charter is good, and this submission and acquiescence shall be an evidence of their consent.(*n*) There may be an election in one body, and approbation in another;(*o*) so, a charter may give a power of election to a less number than the majority of a definite body; and in a prescriptive corporation, a usage to this effect is evidence of such a charter;(*p*) so, where the person elected is unqualified, and the electors have notice of the want of qualification, their votes to him are thrown away, and the person who has the next greater number is to be considered as duly elected, and is entitled to be sworn in;(*q*) so, where a candidate is proposed in a corporate meeting duly assembled, and a majority of the persons assembled protest against any election, and do not propose any other candidate, the minority may elect the candidate proposed;(*r*) so, where the time and manner of election are not fixed by charter or prescription, it is competent to a corporation to make regulations respecting them.(*s*) To the above points of difference between corporations and natural persons may be

(*h*) *R. v. Truebody*, 2 *Ld. Raym.* 1275, cited *Dougl.* 152, 157; see also *Styles*, 151; *Palm.* 451; 1 *Sid.* 14; 2 *Sid.* 97; *Fort.* 205; *Comb.* 198; 1 *Show.* 259; *R. v. Richardson*, 1 *Burr.* 517.

(*i*) *R. v. Richardson*, 1 *Burr.* 517, 520. 540.

(*k*) 1 *Ld. Raym.* 226.

(*l*) *R. v. Rippon (Mayor)* 1 *Ld. Raym.* 563; *S. C.*, 2 *Salk.* 423.

(*m*) *Dr. Owen and Dr. Stainol*, *Skinn.* 45.

(*n*) *R. v. Larwood*, *Skinn.* 574.

(*o*) *R. v. Norwich (Mayor, &c.)* 2 *Salk.* 436.

(*p*) *R. v. Hoyte*, 6 *T. R.* 430.

(*q*) *R. v. Boseawen, &c.*, cited in *Oldknow v. Wainwright*, 2 *Burr.* 1020; *Cowp.* 537; *Taylor v. Bath (Mayor, &c.)* cited *Cowp.* 537; *R. v. Hawkins*, 10 *East*, 211; *R. v. Parry*, 14 *East*, 549.

(*r*) *Oldknow v. Wainwright*, 2 *Burr.* 1017; see also *R. v. Monday*, *Cowp.* 530.

(*s*) *Macshell v. Nevinsan*, 2 *Ld. Raym.* 1355; *Newling v. Francis*, 3 *T. R.* 189.

added some others, as that a corporation cannot be *executors, administrators, or joint tenants, although they may be trustees, and [*564] the members regularly cannot be witnesses for the corporation ;(t) so, they cannot commit treason or felony, or be excommunicated.(t)

6. *How Corporations are visited.*

719. The visitation of corporations comprehends in it—

- a. By whom the visitation may be made.
- b. Extent of the visitor's jurisdiction.
- c. How far the visitatorial power may be controlled.

a. *By whom Visitation may be made.*

As a rule, civil corporations are subject to the visitation of the queen in her Court of Queen's Bench ;(1) spiritual corporations are visited in ecclesiastical matters by the ordinary ; and eleemosynary corporations by the founder, his heirs or assigns,(u) but the term is most commonly applied to spiritual or eleemosynary corporations.

As to spiritual corporations, it is said, that the king, by the ancient law of the realm, had power to visit and reform all abuses in the church ;(x) therefore all free chapels of the king's foundation are visitable by the queen and not by the ordinary ;(y) so, all hospitals and donatives ;(y) so, though governors of an a hospital or school are appointed, yet, if they have not an express visitatorial power given to them, the queen may visit them ;(z) so, by the 25 H. 8, c. 21, archbishops and others shall have no authority to visit any college, hospital, &c., before exempt from their visitation, but visitation shall be by the king, &c. ; so, by the 31 H. 8, c. 13, all monasteries, &c. dissolved, and all churches belonging to them, although before exempt, shall be within the visitation of the ordinary or of the queen, &c. ; so, where *the queen and a subject join in a foundation, the queen shall [*565] visit as a founder.(a)

The visitation of the queen's free chapels, &c., shall be by her chancellor,(b) and if any other visit them, prohibition lies ;(c) so, the queen may make visitation by special commissioners,(d) as provided by 25 H. 8, c. 21, as to visiting colleges, &c. before exempt ; so, by the 1 El. c. 1, all privileges, jurisdictions, &c. heretofore used for visiting the ecclesiastical estate, persons, &c. shall be annexed to the Crown.

720. All spiritual persons generally are subject to the visitation of the bishop or other ordinary ;(e) so, by the 2 H. 5, c. 1, the ordinary shall inquire of all hospitals not founded by the king, of the manner of their foundation, governance, &c., and though the patronage of a deanery be given to

(t) 10 Co. 32 ; 1 Comm. 470.

(x) Dav. 4 ; 2 Roll. Abr. 230.

(z) 1 Eq. Ca. Ab. 182.

(b) F. N. B. 42, A. ; 1 Inst. 96, a ; Dav. 46 b ; 2 Roll. 230.

(c) Reg. 40 b.

(d) Dav. 46 b.

(u) 1 Comm. 480.

(y) 2 Roll. Abr. 230.

(a) 2 Inst. 68.

(e) 2 Roll. Abr. 229.

(1) In Pennsylvania vested in the S. C., *Black v. Vandyke*, 2 Whart. 313.

the queen by Act of Parliament, with a saving of all rights, &c. to all strangers except the bishop, and the queen appoints a dean, the dean is visitable by the ordinary notwithstanding the saving, for this relates to the possessions, and the deanery is spiritual; so, if an hospital be suppressed by Act of Parliament, and their possessions vested in the queen, the visitation of them does not thereby cease till the incorporation of them be dissolved; (e) so, every spiritual hospital shall be visited by the ordinary, but a lay corporation he neither can nor ought to visit; (g) so, by the 14 El. c. 5, after the death of the founder, if no visiter be appointed, the bishop, or his chancellor, shall visit all hospitals within his diocese, to see that they be ordered according to the statutes of the foundation. (g)

If the visitatorial power be given to the bishop of E. not by his Christian name, the grant is to him in his politic capacity, and it is not necessary to mention his successors. (h) *Visitation shall be made without commission, for it is under the Great Seal, (i) and by the ancient law it ought to be annual, (k) but by the modern practice the bishop makes only a triennial visitation. (k)

721. If any foundation for charitable purposes be made by a subject, and no special visiter appointed, the founder and his heirs by the common law are visitors, (l) as the founder of a college or hospital not spiritual; (m) if governors be appointed, but no visiter, the governors shall visit; (n) so, if a common person be founder, he shall visit, although the queen afterwards gives to the same corporation greater possessions. (o)

So, the founder or patron of any eleemosynary foundation and his heirs are visitors, though the patron does not claim to be so during his life; (p) and this visitatorial power is incidental to the patronage by the common law, not introduced by any canon or ecclesiastical law. (p)

So, upon the foundation of any corporation aggregate for a charity, the founder may constitute a special visiter, (q) and as the power of appointing a visiter is entirely in the founder, he may delegate it either generally or specially; if he appoint a general visiter without any restraint, the person so appointed has all incidental powers; but a person constituted visiter in general terms may be restrained in particular instances, and a founder may appoint a special visiter for a particular purpose and no further. So, he may make a general visiter, and yet appoint an inferior particular power, to be executed by another person; thus, the visitation at large may be in one person, and that of one of the members as the head may be in another person who shall be *special visiter; (r) and where there are such [567] special visitors, governors, or overseers, they are not by the 39 El. c. 6, to be subject to the commissioners for charitable uses.

No technical or set form of words is necessary for the appointment of a

(e) 2 Roll. Abr. 229.

(g) Case of Sutton's Hospital, 10 Co. 31 a.

(h) Bentley v. Ely (Bp.), 2 Str. 913; S. C., Fitzg. 303.

(i) 2 Rushw. 451.

(k) Cod. J. Ecc. 998.

(l) 8 Ass. 29; Ca. Parl. 45; Eq. Ca. Ab. 180; Phillips v. Bury, 4 Mod. 124.

(m) Ca. Parl. 46; Bro. Deposition, 10; Ney, 91; 2 Roll. Abr. 230.

(n) Case of Sutton's Hospital, 10 Co. 31.

(o) 2 Inst. 68.

(p) Ca. Parl. 45; cited Com. Dig. tit. Visitor, (A. 4).

(q) 1 Inst. 96, a.

(r) St. John's College v. Toddington, 1 Burr. 200; see also Fitzg. 108. 307; 3 Atk. 663; 1 Vez. 18; 2 Vez. 328.

visiter; *visitor sit Episcopus Eliensis*," is an appointment of a general and perpetual visiter;(s) and a person may be a general or special visiter without any express appointment, by construction and implication from various branches of the statutes;(s) so, if the founder shows his intention that a certain individual, or constituted body, or corporation sole shall exercise those powers which a visiter would have, that has the effect of an appointment;(t) so, a power to interpret and determine doubts upon the statutes, if given in clear words, may itself constitute a visitatorial power.(u)

If the founder dies, without making any appointment of a visiter, and without heirs, it will in that case devolve upon the queen, to be executed by the Great Seal.(x)

b. *Extent of the Visiter's Jurisdiction.*

722. It is only over eleemosynary foundations that the visitatorial power, properly so called, extends;(y) and the ordinary may in his general visitation, by virtue of his general power, deprive a canon or prebendary for incontinency or other offences described in the statutes; and this of his own authority, without observing all the forms the statutes may appoint.(z) So, the power of a visiter must be regulated according to the statutes of the college, or customs of the place,(a) "and it must be collected from the whole *purview of the statutes, considered together, what power the founder meant to give to the visiter."(b) [*568]

A visiter has a general authority to inspect that the college, &c. be governed according to the statutes of the founder,(c) and may make visitation for redress of grievances;(c) so, to proceed upon a grievance done in the time of his predecessor, *R. v. All Souls College, &c.*,(d) in which case it was decided that the visiter can admit, as well as oust a fellow; but in *R. v. St. John's College, &c.*,(e) it was held that the visiter has no power to refuse a nominee to a vacant fellowship, for until he is of the foundation the visiter has no jurisdiction over him, and in this case it was added, "The visiter shall determine all that relates to persons that are of the foundation; but here is a collateral interest in the city of Bristol, they are no part of the college, and the visiter has no power before a person is made a member;" so, in *R. v. Windham*,(f) it was held that a visiter could only decide private disputes between the members of a college, &c., but not suits by a stranger against the body.(f)

But the power of a visiter extends to all new fellowships and scholarships engrafted on the old foundation, unless there be any particular exception by the terms of the new foundation.(g)

(s) *Bentley v. Ely* (Bp.), 2 Str. 913; S. C., Fitzg. 308.

(t) *Attorney-General v. Talbot*, 3 Atk. 662.

(u) *Ex parte Kirkby Ravensworth Hospital*, 15 Ves. 305.

(x) *R. v. Master, &c. of Catherine Hall*, 4 T. R. 233; *Ex parte Wrangham*, 2 Ves. jun. 699.

(y) 1 Wooddes. 474.

(z) *R. v. Chester* (Bp.), 1 Wils. 206; S. C., 1 Bl. 22.

(a) 2 Ayl. Hist. Oxf. 81.

(b) *Per* Ld. Mansfield, 1 Burr. 200.

(c) *Phillips v. Bury*, 4 Mod. 110.

(d) *Skinn.* 13.

(e) 4 Mod. 233; S. C., *Skinn.* 369; *Comb.* 279.

(f) *Cowp.* 378.

(g) *St. John's College v. Toddington*, 1 Burr. 202, 203, recognizing *Attorney-General v. Talbot*, 3 Atk. 662.

723. A bishop, as visiter of a dean and chapel, seems to have no jurisdiction to determine between the members on the subject of their corporate property, for this is held to be a great question ;(*h*) but it is settled that where the dispute is between the body and the executors or administrators of a deceased member he has no jurisdiction in the matter ;(*h*) so, it is clear that [*569] he cannot by virtue of such *power fill up a vacancy in the stalls of the cathedral by lapse, such an office being a freehold ;(*i*) and whether he can, as visiter, even make a temporary election to such stalls is not settled. (*i*) So, where an estate is in the college, that is, in the whole body, and they are to act in a trust, the visiter cannot meddle in a matter which is the subject of such trust ;(*k*) but subsequent benefactions may be put under the power of the visiter or not, at the will of the donor, (*k*) and he may prescribe the manner in which the visiter shall exercise his power ;(*l*) so, though a general visiter has incidental power, yet the founder may restrain him as to particular instances, as where the Crown reserved to itself the right of making statutes ; in that case, the altering of statutes is excepted from the visiter's power, *St. John's College v. Toddington* ;(*m*) and in this case it is said, "Where a body of statutes has been given by the founder I should doubt extremely whether a visiter can alter those statutes or give new laws, whatever may have been the notion in former times." (*n*) See further *infra*, § 724.

c. How far a Visiter's Power may be controlled.

724. If a visiter gives sentence as to what comes within his jurisdiction, it shall be definitive, (*1*) for no appeal lies to the queen, or elsewhere ;(*o*) and, therefore, if his sentence or deprivation be shewn in pleading, it is not necessary to say for what cause it was ;(*p*) so, the queen's courts will not anticipate the judgment of a visiter, or take away his jurisdiction, if the case in which they are called upon to interfere appears to be within the scope of the general visitatorial power ;(*q*) so, his sentence shall not be examined in [*570] a collateral *action, *Phillips v. Bury*, (*r*) which judgment was reversed in Parliament, (*r*) and it is the same in the case of a temporal as a spiritual corporation ;(*r*) so, a *mandamus* does not lie to restore a person to a fellowship of which he is deprived by a visiter ;(*s*) and it has never been determined whether a *mandamus* lies to a visiter ;(*t*) and in a return to a *mandamus* directed to a college, it is sufficient to state in general terms, that such a person is visiter, for as visiter he is empowered to determine all matters

(*h*) *R. v. Epis. Dunelm.*, 1 Burr. 567. (*i*) *Chichester (Bp.) v. Harwood*, 1 T. R. 650.

(*k*) *Green v. Rutherford*, 1 Vez. 46.

(*l*) *St. John's College, Cambridge, v. Toddington*, 1 Burr. 158.

(*m*) 1 Burr. 201.

(*n*) Per *Ld. Mansfield*, *St. John's College, Cambridge*, *sup.*

(*o*) *Dy.* 209 a ; *Appleford's case*, 1 Mod. 82 ; *S. C.*, *Carth.* 92 ; 1 *Lev.* 23, 63 ; *Phillips v. Bury*, 4 Mod. 112 ; *R. v. Episc. Eliens.*, 5 T. R. 475.

(*p*) 4 Mod. 124.

(*q*) *Attorney-General v. Talbot*, 3 Atk. 674.

(*r*) 4 Mod. 113, per *Holt, C. J.* ; *sed contra*, three judges.

(*s*) *Mr. Parkinson's case*, 3 Mod. 265 ; *S. C.*, *Comb.* 143 ; *S. C.*, *Carth.* 92 ; *S. C.*, 1 *Show. P. C.* 74 ; *S. C.*, 1 *Holt*, 143.

(*t*) 1 *Wils.* 266 ; 1 *Bl.* 52, 71, 82.

(1) So in all cases where by the charter a judicial tribunal is created—for it is one of the party's own selection. *Black v. Vandyke*, 2 *Whart.* 313.

that come before him as grievances, unless he be particularly restrained by the statutes ;(*u*) but if he who is no visiter attempts a visitation, a prohibition will lie ;(*x*) so, if a visitor should assume the power of making new statutes, the Court of Q. B. would restrain ;(*y*) so, if the statutes of a college give to the same person who is visiter the power of appointing to an office one out of two persons returned to him by the college, he has that appointment not as visiter, but by virtue of such power, and therefore must make choice of one of the persons returned to him ; and if he assume the appointment of any other person, the Court of Q. B. will interfere ;(*z*) and so if the visiter be a party, therefore, where a *mandamus* was directed to the Bishop of Chester, as Warden of Manchester College, to admit a chaplain, and he made return that he was visiter of the society, held, that though a *mandamus* would not lie where there was a visiter free from objection, yet here the two offices being in the same person, there was a temporary suspension, and the Q. B. must exert its authority ;(*a*) so, where a visiter in his citation of a party to answer articles changed to be violations of the statutes did not set forth his genuine authority, the Court of Q. B. granted a prohibition ; but the House of Lords, on a writ of error, *reversed [571] the former judgment, but as to some of the articles confirmed the prohibition, and as to others allowed the bishop to proceed.(*b*)

725. It is now settled where there is no question in whom the right of visitation is vested, and a visiter refuses to hear an appeal, the Court of Queen's Bench will compel him by *mandamus* to exercise his visitatorial power, but it will not compel him to give a particular decision upon the merits or control his judgment, and the visiter is not obliged to hear the party personally, or to receive parol evidence, it is sufficient if he receives the grounds of the appeal and gives an answer to them in writing ;(*c*) and in *R. v. Bland*,(*d*) it is said that the bare averment of there being a visiter is not sufficient to exclude the jurisdiction, but the extent of his authority must appear, and the Court must be satisfied that he can do complete justice, otherwise a *mandamus* will be issued ; but as to the contrary decisions on this point, see *Skinn.* 13 ; also *R. v. Ely* (Bishop),(*e*) and ante, § 724 ; and where the visiter has actually executed a sentence of expulsion, though he may appear to have exceeded his jurisdiction, the Court will not grant a *mandamus* to restore the party expelled,(*f*) but a party expelled from his freehold may have a remedy by ejectment ;(*f*) so, when the visiter has pronounced a sentence, which, by the statutes of the college, a particular officer is to put into execution, the Court will not compel that particular officer by *mandamus* to do his duty, because that would be to interfere with the privilege of the visiter, who has power to compel the proper person to execute the sentence ; but it seems doubtful whether, if the visiter himself

(*u*) *R. v. Alsop*, 2 Show. 170.

(*x*) 4 Mod. 110.

(*y*) *R. v. Windham*, Cowp. 378 ; see also 1 Vez. 473.

(*z*) *R. v. El. Episc.* 2 T. R. 290.

(*a*) *R. v. Episc. Cestr.*, 2 Stra. 797.

(*b*) *Bentley v. Ely*, (Bp.) 2 Str. 912 ; S. C., Fitzg. 107, 305 ; S. C., in error, 4 B. P. C. 41.

(*c*) *Phillips v. Bury*, 2 T. R. 346, n. ; *R. v. Lincoln*, (Bp.) 2 T. R. 333 ; *R. v. Worcester*, (Bp.) 4 M. & S. 415.

(*d*) Cited 1 Vez. 470.

(*e*) 1 Wils. 266 ; S. C., 1 Bl. 52.

(*f*) *R. v. Chester*, (Bp.) 1 Wils. 209 ; S. C., 1 Bl. 25, 58.

[*572] refuse to compel the execution of the sentence, the *Court will grant a *mandamus* directed to him for that purpose.(f)

726. Where the public laws of the land are violated, the Court of Queen's Bench will interfere, for a visitor has no authority to determine matters against the statutes of the realm, for he is a private judge who is to determine only offences against the statutes of the college where he is visitor, Case of St. John's College, Cambridge,(g) which was a case of neglect to take the required oaths.

If the performance of a trust is to be decreed, a court of equity must be resorted to, for a visitor is incompetent to do complete justice, as where a rectory, not the founder's property, was given in special trust, and this trust was limited by rules differing from and in some parts contrary to the statutes, held, that the visitor, who was bound to judge only according the statutes, could not give a remedy on this trust, but the college was obliged to apply to the Court of Chancery;(h) and it cannot differ the case, that the corporation of the college happened to be the trustees, for suppose it had been on trust to present a member of another, the visitor of this college could have no power over it;(i) so, if a college agree with a stranger to grant him a lease, and refuse to perform the agreement, the remedy is by bill in equity for specific performance, and not by appeal to the visitor.(k)

So, with regard to the revenue of a charity, where there is a visitor who is clothed with a trust for the management of the same, the Court of Chancery has jurisdiction to compel a due application thereof;(l) particularly in cases of alleged breach of trust, a petition signed and allowed by the [*573] Attorney-General *may, under the 52 G. 3, c. 10, (see Dig. P. ii. tit. Charities) be presented to the Lord Chancellor, who is to hear the same and make order thereon;(m) but the jurisdiction under this act is discretionary,(n) and being limited to questions of abuse of trust, as between trustees and the objects of the charity, is not applicable to an adverse claim to land, as having formerly belonged to the charity.(o)

7. How Corporations may be dissolved.

727. A corporation may be dissolved in three ways, that is, either by abuser or misuser, and thereby a forfeiture;(p) by surrender;(q) or by the death of all its members.(r)

As to the first cause of dissolution, since all franchises flow from the bounty of the Crown, there is a tacit or implied condition annexed to such

(f) Dr. Walker's case, Ca. temp. Hardw. 212; R. v. Episc. Eliens., Andr. 176.

(g) 4 Mod. 233.

(h) Green v. Rutherford, 1 Vez. 462, 473.

(i) Id. 474.

(k) R. v. Windham, Cowp. 378.

(l) Attorney-General v. Governors of the Foundling Hospital, 2 Ves. jun. 42; Attorney-General v. Dixie, 13 Ves. 519.

(m) Berkhamstead Free School, ex parte, 2 V. & B. 134.

(n) 3 V. & B. 11.

(o) Ex parte Rees, 3 V. & B. 10.

(p) 2 Inst. 222; Sir James Smith's case, 4 Mod. 27.

(q) Palmer v. Butler, 1 Salk. 191.

(r) Colchester (Mayor, &c.) v. Seaber, 3 Burr. 1866.

grants, which, if broken, forfeits the whole franchise,(1) as if a corporation should impose new taxes, which is contrary to law,(s) City of London case;(t) see also Smyth's case;(u) in this last case it was held, that though a corporation may be forfeited, yet that the proceedings and judgment (which was never recorded) in the *quo warranto* against the city did not dissolve the body politic, or make their subsequent acts void. In *R. v. Amery*,(x) a judgment against a corporation *quousque*, &c., in default of appearance, was held to operate as a final judgment to dissolve the corporation, if they did not appear in the same term, or the next at furthest, but this judgment was afterwards reversed in error.(x) By the 1 & 2 W. & M. c. 8, ss. 1, 3, judgment against the City of London in *quo warranto* was declared illegal and void, *and the franchises of the City are [*574] preserved from forfeiture for any cause whatever.

The debts of a corporation either to or from it are totally extinguished by its dissolution; but where a new charter is granted, this revives the rights and liabilities of the old corporation.(y)

728. As to a surrender, although a corporation may be dissolved by surrendering the charter,(2) yet the surrender of an old charter is void for want of enrolment,(z) and a charter granted on a void surrender is void, *Piper v. Dennis*;(a) see also *R. v. Osbourne*,(b) where this point is fully recognized. Though a dean and chapter have surrendered all their possessions to the queen, yet their corporation continues, and they remain a chapter of the bishop to assist him in spiritual matters.(c)

As to the dissolution of a corporation by the death of parties, if all the members of an aggregate corporation die, the body politic is dissolved;(d) but if the king make a corporation, consisting of twelve men, to continue always in succession, and when one of them dies, the others choose one in his place, held, that if three or four of them died, yet all acts done by the rest shall be sufficient;(e) so, if any corporation aggregate, as mayor and commonalty, or dean and chapter, make a feoffment and letter of attorney to deliver seisin, this authority does not determine by the death of the mayor or dean, but the attorney may well execute the power after their death,

(s) 20 E. 4, pl. 5; 2 Inst. 222.

(t) Pollexf. 70.

(u) 4 Mod. 52; S. C., 1 Show. 280.

(x) 2 T. R. 515.

(y) Colchester (Mayor, &c.) v. Seaber, 3 Burr. 1866.

(z) Butler v. Palmer, 1 Salk. 292.

(a) 12 Mod. 253.

(b) 4 East, 327.

(c) 3 Co. 75, b.

(d) 1 Roll. Abr. 514.

(e) Case of Sutton's Hospital, 10 Co. 30 b.

(1) Terrel v. Taylor, 9 Cranch, 43. That dissolution by forfeiture, &c., can only be taken advantage of by judgment in a proceeding by the Commonwealth is uniformly recognized, for the state may waive the right. 2 Kent Com. 312-13-14, and cases cited in the notes there. Enfield v. Connecticut, 7 Conn. 45, 46. The Banks v. Poiteaux, 3 Rand. 136. Lehigh v. Lehigh, 4 Raw. 9.

The contrary doctrine advanced in Slee v. Bloom, 19 Johns. 475, is confined to the particular question then before the court, viz., that the corporation might be considered so far dissolved by insolvency as to give a right of action against the individual members. Bank of Niagara v. Johnson, 8 Wend. 654.

(2) Mumma v. Potomac Co., 8 Pet. 257; and this surrender must have been accepted by the proper authority. Enfield v. Connecticut, 7 Conn. 45-6. Revere v. Boston, 15 Pick. 359-60.

because the letter of attorney is an authority from the body aggregate, which subsists after the death of the mayor or dean; *sed secus* if the mayor or dean be named by their own private names, and *die or be [*575] removed before livery, livery after seems not good.(f)

Where a corporation consists of several distinct integral parts, if one of those parts become extinct, whether by the death of the persons of whom it is composed, or by any other means, it seems to have been doubted in Colchester (Mayor, &c.) v. Seaber,(g) but was settled in R. v. Passmore,(h) that when an integral part of a corporation is gone, and the corporation has no power of restoring it, or of doing any corporate act, the corporation is so far dissolved(1) that the Crown may grant a new charter to a different set of men.

If lands are given to a corporation which is afterwards dissolved, the donor shall have the lands again, for the law annexes such a condition in every grant to a body politic;(i)(2) but in Hal. MSS., 20 Ja. C. B., (citing 21 E. 4. 1; 21 H. 7. 9; also Johnson v. Morris,) it is said that the lands shall escheat; and the case of Johnson v. Norway,(k) probably the same case as that cited by Lord Hale, is also against the donor, but it is not there said that the judges finally decided the point, see also *contrà*, Southwell v. Wade,(l) wherein is my Lord Coke's judgment. A debt due to a corporation still remains, though their name is changed by a new charter,(m) see further on this point, ante, § 699.

[*576] *II. How Franchises may be claimed.

§ 729. Franchises derived from the Crown.	729. May be claimed by Charter. Construction of Charter.
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§ 729. All franchises are derived from the Crown, and ought to be claimed by charter or by prescription, which supposes a grant;(n) for whatever may be claimed without matter of record, may be claimed by prescription,(o) as the privilege to be a county palatine, to hold a court-leet, &c., see ante, § 623 et seq.; but franchises and liberties, which cannot be seized before the cause of forfeiture appears upon record, cannot be claimed by prescription, as to have fugitives' goods, conusance of pleas, and deodands, see ante, §§ 675, 676.

(f) 1 Inst. 52, b.; 2 Roll. Abr. 12.

(g) 3 Burr. 1866.

(h) 3 T. R. 199.

(i) 1 Inst. 13, b.; Moor, 283; Godb. 211.⁹

(k) Winch, 37.

(l) 1 Roll. Abr. 861.

(m) 3 Lev. 238.

(n) 2 Inst. 281. 496; 9 Co. 27 b.

(o) 1 Inst. 114.

(1) Phillipps v. Wickham, 1 Paig. Ch. R. 590. Lehigh v. Lehigh, 4 Raw. 9. Rose v. The Turnpike Co. 3 W. 46.

(2) It is said in Mumma v. Potomac Co. 8 Pet. 286, that on a surrender the property held in trust for the corporation, or which has not passed into the hands of bona fide purchasers, would remain subject to its engagements. But it seems this rule would not prevail in case of dissolution by judgment for forfeiture. Bank v. The State, 1 Black, 263.

Franchises which do not lie in prescription, but are only allowable by charter, if the grant was before time of memory, may be claimed by charter of confirmation or allowance in Eyre, or before the justices in Q. B., C. P., or Exchq., without shewing the original grant, (p) and also without such confirmation or allowance; (q) and an allowance in Eyre was held peremptory to the king, (r) but not in the Q. B. if the grant afterwards appear to be illegal; (r) and in *Biddulph v. Ather* (s) it was held, that allowance in Eyre is not conclusive evidence against third persons, therefore, where the plaintiff proved that the lords of the manor of Lancing had taken and enjoyed wreck for ninety-two years, held, that two allowances in Eyre and a judgment in trespass 400 years since are not conclusive evidence against usage for that time; and it was said in this case, "The present records were no more conclusive evidence than an inquisition **post mortem*, [*577] or a verdict (in many cases) touching the same matter, which is often *res inter alios acta*, as in the action of trespass; it might, perhaps, be brought by the person then in possession against persons who were mere wrongdoers for anything that appears; in pleading an allowance in Eyre, the true way is to allege an immemorial usage, and then also to produce the allowance in B. R. or in Eyre." (t)

730. An ancient charter, if the words are general or obscure, shall be construed according to ancient allowance, (u) or according to the import of the words when the charter was made, and subsequent usage; but if the charters were granted within time of memory, then they are pleadable without shewing any allowance. (x) By the 3 (or 3 & 4) Ed. 6, c. 4, and 13 El. c. 6, if the charter be lost, showing an exemplification or *constat* of the roll is sufficient. (y)

Of franchises which may be claimed by prescription, as wreck, waif, stray, &c., as they may be originally claimed by usage, which is a matter *in pais*, so usage may support them without the aid of any record either of creation, allowance, or confirmation. (z)

III. How Franchises may be lost or destroyed.

§ 731. Merger of Franchises in the Crown.
Revivor of Franchises.

§ 732. Forfeiture of Franchises.
Surrender of Franchises.

§ 731. If Franchises and liberties are granted by the queen, which were before in *esse*, and afterwards by escheat surrender, or otherwise come back to the Crown, they are **reunited* to and merge in the Crown, and the queen has them in *jure coronæ* as before, such as fugitives' [*578]

(p) 2 Inst. 231; Case of the Abbot of Strata Marcella, 9 Co. 23 a; 2 Roll. Abr. 201.

(q) 2 Roll. Abr. 200; W. Jo. 284.

(r) 2 Roll. 201.

(s) 2 Wils. 23.

(t) Per Holt, C. J., 1 Salk. 184, cited and recognized in *Biddulph v. Ather*, 2 Wils. 23.

(u) 2 Inst. 232; 9 Co. 23 a.

(x) 9 Co. 23 a.

(y) 2 Inst. 232.

(z) Case of the Abbot of Strata Marcella, 9 Co. 23 a; see also 2 Inst. 231; Kitch. 60 b

goods, deodands, wreck, waif, estrays, &c., within such possessions, and if the wreck, waif, estrays, &c. were appendant before to possessions, the appendancy is extinct, and the queen is seised of them in *jure coronæ*; (a) but when a franchise was at the beginning erected and created by the king, and was not before parcel of any such flower of the Crown, there, by the accession of them again to the Crown, it is not extinct, nor the appendancy of it severed from the possessions; as if a fair, market, hundred, leet, park, warren, and the like, are appendants to manors, or in gross, and afterwards comes back to the Crown, it remains in *esse*, not merged in the Crown, for it was at first newly created by the king, and was not in *esse* before, and time and usage have made it appendant, (b) therefore, where a lieutenant of the king's chace had title by prescription to hunt within the manor of S., as in the purlieu of the chace, if the manor came to the king, and afterwards was regranted, the liberty to hunt there was not extinct, (c) yet it seems doubtful whether the grant of a hundred since the 14 E. 3, c. 9, be good, (d) at least it cannot be good unless where the hundred had been granted in fee before that statute; (e) for ancient hundreds, which were united to the counties by the 2 Ed. 3, c. 12, could not afterwards be granted by the king, and those which were excepted in that statute as being granted in fee, when they came again to the Crown, could not be regranted because they were merged in the Crown. (e)

But all such franchises as become merged in the Crown, being the ancient revenues of the Crown, may become revived by Act of Parliament, [*579] as the liberties annexed to the *possessions of the abbeyes were revived by the 32 H. 8, c. 24; but those which are not extinguished by a reunion to the Crown do not require to be revived; (f) therefore, the king granted *bona felonum*, &c., to an abbot, and his possessions were given to the king by the 27 H. 8, or 32 H. 8, the king became seised of them again as before. (f)

732. Franchises may also be lost by forfeiture. Some franchises are lost by non-user, as a fair, market, court, or such like liberties, wherein the subjects have an interest for their common profit or common justice, these will be forfeited by disuse, and non-user will then be a cause of seizing the same, but the non-user of parks or warrens, or such like, which are to the profit only or pleasure of the owner, is not any cause of their forfeiture; (g) so, a corporation may be forfeited by a breach of the trust reposed in them; (h) see further, ante, § 372; also as to forfeiture generally, see post, TITLE TO THINGS REAL.

A franchise may also be lost by surrender, as where a corporation surrenders its charter, see ante, § 728; as to usurpation or disturbance of a franchise, see post, INJURIES TO THINGS REAL.

(a) Case of the Abbot of Strata Marcella, 9 Co. 25; see also Plowd. 219; Moor, 474; Paln. 78; 1 Andr. 87.

(b) *Ib.*; see also Sir John Darcy's case, 6 Ed. 3. 32, 43; Ed. 3. 32; and other authorities, cit. 9 Co. 24 b; also Dy. 44, pl. 32; 108, pl. 30; Heddy v. Wheelhouse, Cro. El. 591.

(c) Dy. 327 a, pl. 3.

(d) *R. v. Kingsmill*, 3 Mod. 200.

(e) *Ib.*; see also 1 Vent. 399; 2 P. Wms. 400.

(f) 9 Co. 25 a.

(g) Cro. Jac. 155.

(h) *W. Jo.* 283; *Skinn.* 320; 4 Mod. 58; 12 Mod. 18. 272.

BOOK II.

THE TENURES BY WHICH THINGS REAL MAY BE HELD.

*The subject of Tenures may be considered under the following heads:— [*580]

CHAP. I.

OF THE NATURE OF TENURES IN GENERAL.

CHAP. II.

MODERN FREE TENURES.

CHAP. III.

COPYHOLDS AND BASE TENURES.

CHAPTER I.

OF THE NATURE OF TENURES IN GENERAL.

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| <p>§ 733. Definition of the Word "Tenure."
734. Things lying in Tenure.
Things lying in Grant.
735. Distinction of different Tenures.
Knight's Service, &c.
Tenures in Capite.
Stat. Quia Emptores, 18 E. 1, c. 1.
736. Extent of the Statute.
737. Derivation of other Tenures.
Ancient Demesne.
Burgage Tenure.</p> | <p>§ 737. Gavelkind.
Copyhold.
Socage.
738. Quality and Quantity of the Services.
Free and base.
Certain and uncertain.
Lay and spiritual.
739. What Tenures are still remaining,
or otherwise.
12 C. 2, c. 24.
740. Application of the Term "Tenure."</p> |
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§ 733. Under the word "tenure" is comprehended every kind of holding of an estate, but is more properly applied to any holding which is coupled with a service, derived from *the feudal law, according to which it became a maxim, although now little more than a fiction, that all [*581]

lands were held either mediately or immediately of the queen, by some service, whence the thing holden was designated by the name of a "tenement," the person holding by that of "tenant," and the manner of holding by that of "tenure."

734. Upon this principle is grounded the distinction between things lying in tenure, and those lying in grant. As a rule, an incorporeal hereditament holden of a subject does not lie in tenure, for there could be no tenure without some service; and to every service, except that which is done by frankalmoigne, distress was and still is incident; but as there is not in an incorporeal hereditament any thing upon which the lord to whom the service is due can distrain, in case the service be not performed, an incorporeal hereditament is said not to lie in tenure; (a) therefore, a fair does not lie in tenure, because the grantor has no remedy by distress for the service reserved in the grant of a fair; (b) so, an advowson appendant to a manor does not lie in tenure, for as such advowson is appendant to the whole manor, the grantor cannot enter and make distress upon any one part of the manor for the service reserved; (c) but an incorporeal hereditament holden immediately of the Crown lies in tenure, for the queen has by her prerogative a power of distraining in any part of the tenant's land, for the services reserved in the grant of the incorporeal estate. (d)

So, in some cases, even an incorporeal hereditament may lie in tenure, although it be holden of a subject, as the vesture or herbage of land, for a distress may be upon the land for the service reserved in the grant of the vesture or herbage; (e) and the better opinion seems to be that an advowson [*582] in gross lies in tenure, because the grantor may distrain *upon the glebe, if any beast of the patron be there, for the service reserved in the grant of the advowson; (f) so, a remainder and reversion, though both incorporeal, nevertheless lie in tenure, for although the grantor has no remedy for the service reserved during the continuance of the particular estate, yet he may, as soon as this is determined, distrain for the service, and if it be a pecuniary one, for the arrear thereof. (g)

735. Tenures are distinguished primarily in reference to the services coupled with them, as tenure by knight's service, tenure by escuage or service in a voyage royal, tenure by grand or petit serjeanty, tenure by cornage, that is, by winding a horn, and tenure by castleguard, that is, by defending a castle, some of which have been abolished by the 12 C. 2, c. 24, and others have been suffered to remain.

Some tenures are so named from the person of whom the land was held, as tenure *in capite* where the holding was of the person of the king, and tenure in gross where the holding was of a subject, either as of his person or as of an honour or manor of which he was seised. Before the statute *Quia Emptores*, 18 E. 1, c. 1, any person might by a grant of land have created as a tenure of his person, or as of his honour or manor, and although

(a) Bro. Ten., pl. 34, 75; 1 Inst. 47, 98, 142.

(b) Jewel's case, 5 Co. 3.

(c) Bro. Ten., pl. 34; 1 Inst. 142, 144.

(d) Id., pl. 18, 34; 1 Inst. 47.

(e) 1 Inst. 47.

(f) Bro. Ten., pl. 4; 1 Inst. 144.

(g) Bro. Distr., pl. 47; Perk. 627; 1 Inst. 47, 144; Capel's case, 1 Co. 62.

by Magna Charta, c. 32, a man could not alien so much of his land as not to leave enough to answer the services due to the superior lord, yet as that statute did not remedy the evil then complained of, it is provided by the 18 E. 1, c. 1, that if any tenant should alien any part of his land or tenement in fee, the alienee should hold the part so aliened immediately of the chief lord of the fee, and should be forthwith charged with the service for so much as pertained to the said lord for such part in proportion to the whole quantity of the land. Since this statute, if a lord conveyed a customary estate to the *tenant, he could not reserve to himself the ancient services, for by reason of the statute, the tenant must thence- [*583] forth hold of the superior lord, and not of the grantor.(h)

736. As this statute, although made after the Statute *de Donis*, is confined to lands and tenements, of which the fee is granted, yet if a gift in tail were made, the donee should hold of the donor and not of the chief lord; for, so long as the reversion continued in him, the donee must hold of him, and the law will not suffer the donee to hold both of the donor and of the chief lord;(i) but if a baron seised in fee of an inheritance in the right of his feme, made a gift in tail, the donee should not hold of the baron, but of the lord of whom the feme held, because the baron had nothing but in right of the feme.(k)

Notwithstanding this statute speaks only of estates in fee simple, yet if a gift was made to A. for life or in tail with remainder to B. in fee, the tenant for life or in tail should hold of the chief lord, for as the whole fee is departed with by the donor, neither of the donees can hold of the donor, and consequently both must hold of the chief lord;(l) if the tenant in tail had the reversion in himself, there, although the two estates continued distinct, yet as he could not hold of himself, the tenure of the estate tail was suspended, and he was tenant to the lord in fee;(m) so, as a man seised of two manors might before this statute by a feoffment in fee, so he may now by a gift in tail, convey a parcel of one manor and a parcel of another to be holden of himself as one tenancy of the same service, and the service shall in that case be regardant to both manors.(n)

*737. Some tenures derive their name from the nature of the land, as tenure in ancient demesne, that is, holding lands parcel of [*584] the royal demesne; others from the place where the land lies, as tenure in burgage, that is, a holding of lands or tenements in a borough; others from a particular kind of service as tenure in gavelkind; others from the mode of creating the tenure, as tenure by copy, that is by copy of court-roll, tenure by the verge, that is, from the ceremony of taking the verge or little rod, as the symbol of taking the estate; and others from the quality of the tenure, as tenure in villenage. So, if, as some suppose, socage is derived from *soc* free, then tenure in socage is as much as free tenure; but if,

(h) Bradshaw v. Lawson, 4 T. R. 443; see also Reay v. Huntington, 4 East, 271.

(i) Bro. Ten., pl. 21, 37; 2 Inst. 505; 2 Roll. Abr. 501.

(k) 1 Inst. 23; 2 Inst. 502.

(l) 2 Inst. 505.

(m) Bro. Ten. 81, 107; F. N. B. 143, A.; Gilb. Ten. by Watkins, n. 42; Vin. Abr. tit. Tenure, (H. a.) pl. 12.

(n) 2 Roll. Abr. 499.

as others suppose, it is derived from *soc* a plough, then it is as much as tenure by plough service.^(o)

738. Tenures are likewise distinguished according to the quality of the service into free or base, free services were such as were not unbecoming a soldier or freeman to perform, as to serve the lord in the wars; base services were such as were fit only for peasants to perform, as to plough the lord's land and the like. The services might also be certain or uncertain; certain services, whether base or free, were such as were stinted in quantity, and could not be extended, as to pay a stated annual rent, or to plough for such a number of days. The uncertain services depended on contingencies, as to do military service in person, or pay an assessment in lieu of it, which are free services, or to do whatever the lord should command, which is a base or villein service. The free tenures are (or were) knight's service, escuage, grand or petty serjeanty, and socage tenure, &c.; those which were originally of the base kind are tenure in ancient demesne, tenure by copy, and by the verge, and tenure in villenage, which was by distinction a [*585] base tenure. All the above-mentioned tenures are of the *lay kind, but the tenure in frankalmoigne, or by divine service, is of the spiritual kind.

739. Of these different tenures, one, namely, tenure in villenage, which was another name for slavery, has fallen into absolute disuse, and those which in their origin were also base have long ceased to be so, as will appear more fully hereafter. Of the free tenures, some, as tenure by knight's service, escuage, and socage in *capite*, have, with all their burthensome incidents, as homage, wardship, marriage, and relief, &c., been abolished by the 12 C. 2, c. 24, which provides that all lands held of his Majesty or any other person should be turned into free and common socage. There remain among the tenures of the free kind which demand further consideration, only grand and petty serjeanty, socage tenure, tenure in burgage, and tenure in gavelkind, see *infra*, § 747 et seq. The tenures of inferior origin that are still extant are copyhold tenure, customary freehold, and tenure in ancient demesne, with some variations thereof, see *infra*, § 765 et seq.

740. On the feudal principle before mentioned, of all lands being holden of the queen, estates in land, though unconnected immediately with any service, are described in similar terms as an estate in fee simple, the owner of which, though it is the highest of all estates, is described as a holder, namely, tenant in fee; so, in like manner, tenant in fee tail, for life, in dower, and the like; and the obligations arising from tenure still attach to the ownership of such estates, as an obligation to repair highways and bridges, see *ante*, § 103; so, a liability to be assessed to the sewers' rate, § 115.

(o) Litt., chap. 5; Somn. Gavelk. 133; Wright, Ten. 142; 2 Comm. 80.

*CHAPTER II.

[*586]

SOCAGE, AND OTHER MODERN TENURES.

SECT. I.

§ 741. SOCAGE TENURE, AND ITS INCIDENTS.

SECT. II.

§ 747. GRAND AND PETTY SERJEANTY.

SECT. III.

§ 749. BURGAGE TENURE.

SECT. IV.

§ 753. TENURE OF GAVELKIND.

SECT. V.

§ 761. TENURE OF FRANKALMOIGNE.

As the tenure of all lands is turned into free and common socage by the 12 C. 2, c. 24, except grand serjeanty, and some few others therein mentioned, it will be necessary to consider the properties and incidents of this tenure, and other tenures of an equally free nature, as grand and petty serjeanty, burgage tenure, tenure in gavelkind, and frankalmoigne.

*SECTION I.

[*587]

SOCAGE TENURE, AND ITS INCIDENTS.

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| § 741. Fealty incident to Socage Tenure. | § 743. In respect of Lands by Descent only. |
| 742. Aids. | 744. Who not to be Guardian. |
| Relief. | Not an Infant. |
| Primer Seisin. | 745. Accounting by Guardian. |
| 743. Wardship. | Duration of Guardianship. |
| Properties of Guardianship. | Not alienable. |
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| 746. Marriage. | |

§ 741. Free and common socage properly denotes a tenure by any certain and determinate service, by which it was mainly distinguished from knight's service. The incidents of socage tenure before the statute were

fealty, aids, relief, primer seisin, wardship, marriage, fines for alienation, and escheats. Fealty was the oath taken by the tenant which served as a bond between him and the lord. This oath, which is not taken away by the statute, may be required by every lord of whom tenements are holden at this day, and usually draws after it suit of court.(a)

742. Aids for knighting the son, and marrying the eldest daughter, were fixed as to their amount by the 28 E. 1, c. 36, but are abolished by the 12 C. 2, c. 24.

Relief, which was a fine paid to the lord on taking up the estate on the death of the last tenant, was and still is due on socage tenure, and as it is an incident of common right to this tenure, it is not necessary to set forth a title to it in replevin.(b) A relief of a knight's fee was 5*l.*, or one-quarter of the supposed value of the land, but a socage relief was one year's rent;(c) so, a relief in knight's service was only payable if the heir was of full age at the death of *his ancestor, but it was otherwise with a socage relief, [*588] which, as Littleton says, must be paid presently, or the lord might distrain for the same.(d)

The statute reserves the relief incident to socage tenure, and therefore, where lands in fee simple, or fee tail, are holden by a rent, a relief is due of common right upon the death of the tenant, that is, when the same is in possession, but if only a remainder or reversion. expectant upon an estate for life, descends on the heir, the relief is not leviable until after the death of the tenant for life, and it seems doubtful whether it be payable at any time.(e) Where the tenure is by fealty only, no relief is due,(f) and see further, post, as to the rights of the lord, §§ 845 et seq.

Primer seisin, which was a feudal burthen similar to the relief, was incident to tenants in *capite*, as well in socage tenure as in knight's service, and is in both cases expressly abolished by the statute.

743. Wardship is another incident common to the tenure in chivalry and to socage tenure; it was, however, very different in its nature in these two tenures, being in the former case an oppressive burthen, and in the latter beneficial for the infant.

The properties of this species of guardianship are as follow:—

First—It springs like the one in chivalry, wholly out of tenure, therefore the title to it cannot arise, unless the infant is seised of lands or hereditaments lying in tenure, for if he be seised of a rent or common of pasture and other hereditaments not lying in tenure, then he may choose his guardian.(g)

Secondly—Like guardianship in chivalry, it is deemed to take place on a descent only, and not where the infant *comes in by purchase, [*589] although this was at one time doubted,(h) see further Dig. P. iii. tit. Guardian and Infant.

(a) Litt., ss. 117 et seq.; 2 Comm. 85; Sulliv. Lect. 63.

(b) Freeman v. Booth, 3 Lev. 145.

(c) 1 Inst. 76, a; 2 Comm. 86.

(d) Litt., s. 127; 2 Roll. Abr. 519.

(e) Keilw. 53 b, 84 a; Kitch. 146, b; Freeman v. Booth, 3 Lev. 145.

(f) 1 Inst. 93, a.

(g) 1 Inst. 88, b; Harg. n. (3).

(h) 2 Mod. 176; Vin. Abr. tit. Guardian, (I. 1).

744. Thirdly—The guardian must be one to whom the inheritance can by no possibility descend.(i) therefore, says Lord Coke, the elder brother of the half blood shall not have the custody of the land, because he may possibly inherit.(k) If there are two or more in equal degree, he who first gains possession of the heir shall have the custody of him, unless they be uncles, or lineal descendants of the infant, when the eldest will be preferred;(l) but where an infant derives lands *ex parte paterná* and *ex parte materná*, the next of kin on either side seizing the infant is entitled to the custody of the body;(m) but the next of blood of the part of the father shall enter into the lands of the part of the mother, and *vice versá*.(n)

If the person entitled to be guardian is himself under custody of a guardian, the wardship of the first infant entitles the guardian to the custody of the second infant, and he is said to be guardian *per cause de ward*;(n) so, an infant not in the custody of another cannot be guardian in socage, because no writ of account lies against an infant.(o) see further, Dig. P. iii. tit. Guardian and Infant, so, for the same reason, an idiot, lunatic, deaf and dumb, or blind person, or a leper, cannot be a guardian.(p)

745. In the fourth place, a guardian in chivalry was not obliged to account to the heir, but it is otherwise with a *guardian in socage, who shall not take any issues or profits to his own use, but only to the use and [*590] profit of the heir.(q)

Fifthly—Wardship in chivalry continued over males until the age of twenty-one, and over females until sixteen; but wardship in socage continues only until the age of fourteen.(r)

Sixthly—Guardianship in socage being wholly for the benefit of the infant, and not in any respect for the guardian's profit. it is not a subject of alienation, forfeiture, or succession, as wardship in chivalry was.(s)

So, guardianship in socage extends not only to the person and socage estates, but also to hereditaments not lying in tenure.(t) and even to copyhold estates unless there is a special custom for a lord's appointing a guardian of them.(u) but not to personalty.(u)

746. There remain two other incidents formerly belonging to this tenure which may be briefly noticed, as they no longer exist. namely, marriage, and fines for alienation. Marriage of the ward was a source of great profit to the guardian in chivalry, but the contrary to the guardian in socage, for the latter was bound to account for the value of the marriage;(x) the statute has, however, abolished this incident to tenure in both cases, so likewise

(i) Carell v. Cuddington, Plowd. 296; 1 Inst. 87, b.

(k) 1 Inst. 87, b.; but see Swan v. Gateland, Cro. El. 825; S. C. nom. Swan v. Gateland, Moor. 635; S. C. nom. Swan's case, Ow. 138; 2 Andr. 171; 2 Roll. Abr. 40; also T. Jo. 17; Carth. 137, 138; 9 Mod. 142.

(l) 1 Inst. 88, a.

(m) Carell v. Cuddington, Plowd. 296.

(n) Vaugh. 184; 2 Roll. Abr. 35, 40.

(o) 7 E. 3. 46; 16 E. 3. 52, Account.

(p) Flet., l. 1, c. 10.

(q) Litt., sect. 123; 1 Inst. 88, b.; Harg., n. (11).

(r) Litt., sect. 123; 1 Inst. 78, b.

(s) Carell v. Cuddington, Plow. 293; 1 Inst. 84, b.; Vaugh. 181; but see F. N. B. 143, P.; and Harg. Co. Litt. 88, b., n. (B).

(t) 1 Inst. 88, a.

(u) Hutt. 17; Eggleton's case, 1 Roll. Abr. 40; Church v. Cudmore, Lutw. 1181.

(x) Litt., sect. 123.

fines for alienation which were common to the two tenures;(y) but it is otherwise with escheats, to which lands of socage tenure are still incident.

[*591]

*SECTION II.

GRAND AND PETTY SERJEANTY.

§ 747. Personal Services belong to these Tenures.		747. Special Properties belonging to Grand Serjeanty.
748. Petty Serjeanty. Homage Auncestell.		

§ 747. These two tenures differ from all others that have ever existed, inasmuch as the services coupled with them are personal services to be performed in relation to the person of the queen, and are purely honorary. Grand serjeanty consists in the honorary services of carrying the queen's sword or banner, of officiating as butler or carver, &c., at the coronation, or of being steward, constable, or chamberlain of England, and the like;(z) so, when any held of the king by cornage, that is, by winding a horn when the Scots or any enemy came, it was grand serjeanty, but if lands were held of any lord by such tenure it was knight's service.(a)

Lord Coke says this tenure hath seven special properties:—1. To be holden of the queen only. 2. It must be done when the tenant is able, in proper person. 3. This service is certain and particular. 4. The relief due in respect of this tenure differeth from knight's service. 5. It is to be done within the realm. 6. It is subject to neither aid *pur faire fils chevalier*, or *file marier*; and 7. It payeth no escuage.(b)

As to the second property of being done in person, that necessarily admitted, and still does admit of exceptions, for in an early case it was held, that where a citizen of London held lands by the tenure of presenting a towel to the king to wash his hands at the coronation, he was admitted to perform the service by deputy, he not being of quality to perform [*592] *this high and honourable service;(c) and it seems that no person under the degree of a knight could be admitted;(c) and as a woman cannot perform the office in person, she will be admitted to do it by deputy;(c) so, in like manner, where the heir is under age, he is disqualified to perform the office in person.

The tenure of grand serjeanty is expressly retained with a reservation of all the honorary services peculiar to it, but as regards the burthensome incidents which it had in common with knight's service, it falls under the general provision by which they are abolished,(d) and is made in effect free

(y) 1 Inst. 73; 2 Inst. 65 et seq.; Wright. Ten. 210.

(z) Litt. sect. 156.

(a) Co. Litt. 107, b.

(b) 1 Inst. 105, b.

(c) 1 Inst. 107, a, b.

(d) Harg. Co. Litt. 107, n.; (1) see also Gilb. Eq. Rep. 176.

and common socage, as is said by Littleton of petty serjeanty, Litt. s. 180, and see *infra*, § 748.

Petty Serjeanty.

748. Petty serjeanty consists not in any personal service like grand serjeanty, but in rendering something annually, as a bow, a sword, and the like to the queen, which, being the same as where a man ought to pay rent, is socage in effect; (e) it is probable, therefore, for this reason, that it is not expressly mentioned in the statute, but being a tenure in *capite*, though of the socage kind, it was liable to livery and primer seisin, from which it is relieved by the general provision relating to these burthens.

There is another tenure mentioned by Littleton under the name of Homage Auncestrell, which was where the same tenant and his ancestors held by homage of the same lord and his ancestors. (f) This tenure is not expressly mentioned in the statute, but falls no doubt within the general provision which abolishes homage. (g) It had in all probability expired before the statute was passed, as my Lord Coke supposes that there was little or no land held, in his day, by that tenure. (h)

*SECTION III.

[*593]

TENURE IN BURGAGE.

§ 749. What is Burgage Tenure.
Borough-English.

750. Force and extent of the Custom in regard to Descent.

§ 751. Special Custom.

752. Dower.

Power of Disposition by Will.

§ 749. Burgage tenure is described by Glanvil and Littleton as but tenure in socage, (i) where the king or other person was lord of an ancient borough in which the tenements were held by a rent certain. Such boroughs had (and still have) divers customs which are connected with this tenure, and distinguish it from the ordinary socage tenure. Such customs are known by the name of Borough-English, and they alter the law in respect of descent as well as of dower, as also to the power of devising.

By the custom of Borough-English, the youngest son shall inherit his father as to the lands of which he dies seised, either in fee simple (k) or fee tail, (l) and there is no difference between the law concerning copyholds in Borough-English, and freeholds in Borough-English: (m) so, if land in Borough-English be given to A. and his heirs for the life of B., and A. die in the life-time of B., leaving two sons, the youngest shall be the special occupant, because the heir, that is, representative of the father, as to land of

(e) Litt., s. 159.

(g) Harg. Co. Litt. 100, b., n. (1.)

(i) Glanv., l. 7, c. 3; Litt. sect. 162.

(l) Weeks v. Carvel, Noy, 106.

(f) Litt., 1, 2, c. 7.

(h) 1 Inst. 100, b.

(k) Litt., sect. 211; 1 Inst. 110, b.

(m) Reve v. Malster, Cro. Car. 411.

that nature, must be the occupant, for where custom makes an heir, the law implies all incidents in course of descents.(n)

[*594] *750. So, it has been held, that the custom will prevail against any disposition of the ancestor, therefore, where a man seised of Borough-English lands made a feoffment to the use of himself and the heirs male of his body *secundum cursum communis legis*, and died leaving issue two sons, the youngest, notwithstanding the feoffment, should inherit the lands ;(o) but it seems to be otherwise in the case of a devise, for in a devise it is said it may be well that an estate in fee shall cease in one, and shall be transferred to another ;(p) so, if a man seised of Borough-English lands died leaving two sons, and the eldest entered by abatement, held, that this should not take away the entry of the youngest, because the eldest should be presumed to enter to preserve the estate in his family, which he or his heirs may some time or other happen to enjoy.(q)

So, where A. had issue five sons, and the youngest died in the lifetime of his father, leaving issue a daughter, after which the father purchased lands in Borough-English, and died, held, that the daughter of the fifth son should inherit ;(r) so, it has been held, that the youngest son should have his whole distributive share of personal estate of his father dying intestate, without bringing into hotchpot an estate of the nature of Borough-English descended to him, for that an estate so descended is not within the Statute of Distributions.(s)

751. By special custom the general custom may be restrained or extended.

The customary descent may be restrained to lands in fee simple, and, therefore, it has been held that lands in fee tail should go to the heir at common law ;(t) so, also, that the descent should be to the youngest by one wife ; but where *a man has sons by different venters, then the eldest should inherit to his father, and not the youngest.(u) So, the general custom may be extended to the collateral line, and the youngest brother shall by custom inherit,(v) or the youngest sister.(w)

The law takes notice of the custom of Borough-English, and, therefore, it is sufficient to allege generally the custom ; but where it is a special custom extending or restraining the general custom, it must be specially pleaded.(x)

752. The custom of Borough-English extends also to the law of dower ; thus in some boroughs the wife shall have dower in respect of all the tene-

(n) Clements v. Scudamore, 1 Salk. 243 ; S. C., 2 Ld. Raym. 1024 ; S. C., 1 P. Wms. 63 ; S. C., 6 Mod. 120 ; Holt, 124 ; S. P., Baxter v. Doudswell, 2 Lev. 138 ; S. C., 3 Keb. 475 ; 2 Danv. 542 ; see also Vaugh. 201 ; 2 Vern. 226.

(o) Dy. 179 b, pl. 45 ; S. C., Jenk. 220.

(p) Wellock v. Hammond, Cro. El. 205.

(q) 1 Inst. 242.

(r) Clements v. Scudamore, 6 Mod. 120 ; S. C., 2 Ld. Raym. 1024 ; S. C., 1 P. Wms. 63 ; S. C., Holt, 124 ; S. P., Baxter v. Doudswell, 2 Lev. 138 ; S. C., 3 Keb. 475 ; 2 Danv. 542 ; see also Vaugh. 201 ; 2 Vern. 226.

(s) Lutwyche v. Lutwyche, Ca. temp. Talb. 276.

(t) Chapman v. Chapman, March, 54.

(u) 1 Inst. 140, b.

(v) Id. 110, b.

(w) Id. 140, b.

(x) Robins. on Gavelk. 38 et seq.

ments which were her husband's;(*y*) so, in some boroughs the wife shall have the moiety of her husband's lands so long as she lives unmarried;(*z*) so, a custom that a wife shall have all her husband's copyholds in fee, as her free bench, is good, but it must be found precisely as it is pleaded;(*a*) so, she shall have dower of rent, or common, for these ensue the nature of the land.(*b*)

By the custom of Borough-English a man might dispose of his lands by will;(*c*) although, by the general law of the land, such a disposition of a man's estate was not permitted before the reign of Hen. 8; so, by the same custom, a man might devise a rent or a common;(*d*) but whether a rent-charge in *esse*, issuing out of such lands, and having commenced within time of memory, was within the custom of devising, was for some time not settled.(*e*)

In some cases the custom is general, that a man may devise any lands;(*f*) in some places, that such lands only can be devised as the devisor purchased; in some, that he *may devise any estates; in others, only an estate for life;(*g*) so, a man may devise to his wife, [*596] because the devise does not take effect until after the decease of the devisor,(*h*) see further, post, tit. CUSTOMARY ESTATES.

SECTION IV.

TENURE OF GAVELKIND.

§ 753. Properties of the tenure of Gavel-kind.	§ 756. Effect of a Condition in a Will.
754. Power of Alienation by Infants.	757. Manner of the Deseent. In the Case of the Queen.
755. Descent. Force of the Custom. Extends to Rent. Antiquity of the Custom.	758. Curtesy and Dower. 759. Gavelkind lands devisable. 760. Partition by Heirs: Prescription not necessary. Manner of pleading the Custom.
756. Effect of a Condition broken.	

§ 753. Gavelkind is another species of socage tenure, the properties of which are as follow :—

1. The tenant is of age at fifteen, so as to be able to alien his estate.(*i*)
2. Gavelkind land was alienable without any license.(*k*)
3. In most places the tenant had the power of devising lands before the Statute of Wills,(*l*) and the power of devising was held to remain although the lands were disgavelled by Act of Parliament.(*m*)

(*y*) Litt. Ten. sect. 166.

(*z*) 1 Inst. 111; F. N. B. 150.

(*a*) Boraston v. Hay, Cro. El. 415.

(*b*) Bro. Custom, 44, 58.

(*c*) Litt., sect. 167.

(*d*) 1 Inst. 111, citing 4 E. 3, 53; 7 H. 6, 1; 22 Ass. 78.

(*e*) Randall v. Jenkins, 1 Mod. 112; Robins. on Gavelk. 79 et. seq.

(*f*) 44 Ass. pl. 36; 18 Ed. 3, 8; 44 Ed. 3, 33.

(*g*) 1 Inst. 112.

(*h*) Litt., sect. 168.

(*i*) 3 Atk. 24.

(*k*) 1 Ander. 193.

(*l*) Launder v. Brooks, Cro. Car. 561; S. C., cited 2 Sid. 154.

(*m*) Wiseman v. Cotton, 1 Lev. 80.

4. The lands descend not to the eldest or the youngest, or to any one son only, but to all the sons together.

5. These lands are not forfeitable for felony, although they are for treason.

[*597] *6. Gavelkind lands are subject to dower and curtesy, see further *infra*, §§ 754 et seq.; also Lamb. Peramb.; Bro. tit. Cust. 54; Somn. on Gavelk.; Robins. on Gavelk., *passim*.

754. Where an infant sells gavelkind lands, it must be for a valuable consideration, or the contract will be void;(n) and this must be done by feoffment, that being the most solemn and public mode of conveyance,(n) and the livery must be made by the infant in person, because an infant cannot make an attorney by the common law, and since the custom does not expressly derogate from the common law in that point, an equitable construction shall not make it derogate, for all customs are to be construed strictly,(o) and as to livery of seisin, see 7 & 8 V. c. 76; Prec. Conv. Append. No. xviii. So, it must be land in possession, and not in reversion or remainder, because the true value of a reversion or remainder cannot be known or computed.(p) So, it must be land coming by descent, and not by purchase, because the infant's purchase could not be the subject-matter for the custom.(p) So, an infant in gavelkind should have his age (now abolished by 11 G. 4, and 1 W. 4, c. 47,) see Dig. P. ii., Courts (Equity.)

755. The custom of gavelkind, as to descent, extends to estates tail, and such is the force of custom, in the descent both of gavelkind, and Borough-English, that even in the case of estates tail it cannot be changed by express words directing a descent *secundum cursum communis legis*;(q) so, if a man give or devise lands in gavelkind to a man and his eldest heirs, this does not alter the customary inheritance,(r) for that can only be done by Act of Parliament;(r) but there is a difference between lands inheritable by descent and those taken by purchase, as if lands of the nature of [*598] *gavelkind be given to B. and his heirs, having issue divers sons, all his sons after his decease shall inherit;(s) but if a lease for life be made, remainder to the right heirs of B., and B. dies, his eldest son only shall inherit, because this remainder being newly created, was not within the custom;(s) but if a man seised of lands in gavelkind made a feoffment to the use of himself and his wife in tail, remainder to his right heirs, held, that this remainder shall go to the heirs by the custom, for it is the old use, and the heirs take by descent, their ancestor having a precedent estate of freehold, and not by purchase;(t) so, where in a devise land is given to the customary heir, it shall go to him, although the subject of the gift is common-law land, as if one having Borough-English land, and also lands at common law, devised the latter to his heir by Borough-English, held, that this was a sufficient description of the youngest son though not heir at common law,(u) and a like devise to gavelkind heirs would entitle all the sons.(u)

(n) Lamb. 625; 1 And. 193.

(o) Lamb. 628; 1 Roll. Abr. 568.

(p) Bendl. 33, pl. 52; Lamb. 627.

(q) Dy. 179 b, pl. 45; see also case of Tanistry, Dav. 31 a, and 36 b.

(r) 1 Inst. 27. b.

(s) Dy. 133 b; Hob. 31; 1 Inst. 140, b.

(t) 26 H. 8. 4 b; Bro. Custom, pl. 1; Lamb. 548; Robins. on Gav. 117 et seq.

(u) 2 Vern. 732; Prec. in Chan. 464.

Rent issuing out of gavelkind land shall ensue the nature of the land, and although it was at one time doubted,(x) yet it seems to be now settled that there is no difference between a rent-service and a rent-charge in this case; therefore, where a rent was granted out of gavelkind land to a man and his heirs, held, that it should descend to all the sons or brothers according to the descent of the land, and not go to the heir-at-law, for the rent issues out and is part of the profits of the land.

The law of gavelkind is unlike other customs, for it is not good if it begins only just before the reign of R. 1, for this custom existed long before any such customs, and almost before any history; therefore, where lands annexed to a rectory in Kent, formerly belonging to one of the suppressed monasteries, and granted by H. 8, to a layman, to be holden *by knight's service in *capite*, were descendible according to the custom [*599] of gavelkind, held, that the tithes were according to the common law, as there could be no ancient descent with respect to them.(y)

756. As a rule, the heir at common law may take advantage of any condition broken,(z) and that too in cases where there is a special heir, whether by the custom by Borough-English or gavelkind, because a condition is a thing of new creation, and altogether collateral to the land, not being in any manner like to rent, which is part of the profits of the land, see *supra*, § 754; but it is said that when the eldest son has entered for the condition broken, the younger children shall enjoy the land with him, because the eldest son is in of the old estate, which is still under the direction of the custom;(a) so, a distinction has been taken between a condition in gross and a condition incident to a reversion, for of the latter the special heir shall take advantage, although not of the former; therefore, where a man made a lease of land, parcel Borough-English and parcel at common law, with a proviso that if the lessor, his heirs or assigns, should give to the lessee a year's warning of his intention to dwell there, then the lease should be void, the lessor died leaving two sons, the eldest assigned over his part to the youngest, the question was whether the youngest was such a person as could give warning, or whether the condition was not gone by the severance of the reversion on the death of the lessor, and it was held, that the special heir might give the warning, for the law which severed the reversion, severed also the condition, so that for one part as heir in Borough-English, and on the other part as assignee of his brother by the 32 H. 8, c. 34, he should take advantage of the condition; but on the other hand, *where a man made a feoffment of Borough-English lands on condition, and died, having issue [*600] two sons, held that the eldest son only should take advantage of the condition, for it was a condition in gross, and not, as in the former case, where the reversion was in the lessor.(b)

Where a man seised in fee of land in gavelkind had issue two sons, and by his last will devised the land to his eldest son, on condition that he paid to the wife of the devisor 100*l.* at a certain day, and he failed in payment, the question was whether the younger brother might enter on a moiety on

(x) *Randal v. Roberts*, Noy, 15, contra, Bro. Rent, 10. 13.

(y) *Lushington v. Landlaff* (Bp.,) 2 N. R. 491. (z) 1 Inst. 233; 8 Co. 44.

(a) *Lamb. Peramb.* 608.

(b) *Moor*, 113, pl. 254; S. C. Godb. 2.

his brother by a limitation implied in the estate,(c) but this doubt is, as Lord Coke observes, well resolved by the following determination.

A copyholder, in fee of land descendible in Borough-English, having three sons and a daughter, after a surrender to the use of his will, devised the land to his eldest son, on condition of his paying to his daughter and each of his other sons 40s., within two years after his death: the eldest son was admitted and did not pay the money; the youngest son entered on the land, and his entry was held lawful, for though the word "paying," in case of a will, might make a condition, yet here the law construed it a limitation, of which the youngest son in Borough-English, might take advantage.(d)

757. The manner of descent of gavelkind lands is first to the male children and then to the female children, then to collateral relations;(e) and the descent has, after the manner of the civil law, regard to the *stirpes*; and therefore if the eldest son had issue a daughter, and died, his daughter [*601] should *jure representationis* inherit her father's share;(f) otherwise the custom agrees with the common law, that a woman shall never take part of an inheritance with a man.(g)

Where lands in gavelkind descended to the king and his brother, held, that the king should take one moiety and his brother the other, but when the king died his moiety should descend to his eldest son, and not according to the rules in gavelkind, for the king was seised of his moiety *jure coronæ*, therefore it shall attend the Crown, and go to his eldest son.

By the 31 H. 8, c. 3, and six other private Acts, a great part of the lands in Kent have been disgavelled, so as to destroy their partible quality and make them descendible to the eldest son, according to the course of the common law;(h) but it has been held, that these lands have lost no other of the qualities belonging to gavelkind land than their partibility.(i)

758. Lands of gavelkind tenure are subject to curtesy and dower. By the custom of gavelkind, a man may be tenant by the curtesy without having any issue,(k) but he is entitled to have only a moiety of the wife's land, and if he marries again it ceases.(l)

So, likewise, the wife, by the same custom, is to have after the death of her husband a moiety of his inheritance in gavelkind, to hold as long as she continues unmarried and chaste;(m) and a woman cannot waive this dower and claim dower at common law, for where gavelkind is the *lex loci*, it must govern the property of that place,(n) and in that case the dower must be a moiety, and not a third of the inheritance, as at common law.(n)

[*602] *759. All gavelkind land is devisable, for being from the beginning allodial it followed the rules of the civil law, which permits

(c) Dy. 316.

(d) Wellocke v. Hammond, 3 Co. 20; S. C., Cro. El. 204; 2 Leon. 114.

(e) 1 Inst. 140, a.; Robins. on Gavelkind, 92.

(f) Litt., sect. 210; Lamb. 608; 1 Inst. 140, a.; 1 Salk. 243; 1 P. Wms. 63; 6 Mod. 129.

(g) Glanv., 1. 7, c. 3.

(h) 1 Inst. 140, b; Rob. on Gavelk. 75.

(i) 1 Sid. 77; Lev. 80; 2 Keb. 288.

(k) 1 Inst. 30, a.

(l) Lamb. 615; 1 Inst. 30, a.; Rob. Gavelk. 135 et seq.

(m) Hunt v. Gilburne, Cro. El. 121; S. C. nom. Hunt and Gilborn's case, 1 Leon. 133; Lamb. 616.

(n) Sav. 91

any person to make his will ;(o) but by the express words of the Statute of Frauds, which is re-enacted by the 7 W. 4 & 1 Vict. c. 26 the devise of these as of other lands must be in writing.

760. Heirs in gavelkind shall make partition as parceners, and a writ of partition lies between them as it does between parceners at common law,(p) and in the declaration upon such writ the custom must be mentioned, as to say that the land is of the custom of gavelkind ; but it is necessary to prescribe, for though the custom is different from the general law of the kingdom, it must be taken notice of to the judges, yet there is no necessity for prescribing, because it is *lex loci* ;(p) so, it is sufficient for any one, who will entitle himself by the custom of gavelkind, to plead that the land is in Kent, and of the nature of gavelkind, without pleading the custom generally ; but if any one will plead the custom of devising, or of having a moiety as tenant by the curtesy or in dower, he must plead the custom specially, for gavelkind is the general law of the place, and not a particular custom, and the judges only take notice of the general and not of the special customs of gavelkind.(q)

*SECTION V.

[*603]

FRANKALMOIGNE.

§ 761. Frankalmoigne excepted out of the Statute.

§ 762. Spiritual Services belong to this Tenure.

§ 761. Frankalmoigne, another tenure which is excepted out of the statute 12 C. 2, c. 24, is that whereby a religious corporation aggregate or sole hold lands of the donor to them and their successors, and the service they had to perform being divine, they were not bound to do fealty,(r) but if a tenant in frankalmoigne alien his land or tenement in fee, to hold of the lord by the same services as he held, the alienee, although he be an ecclesiastic, shall hold it by fealty, for he cannot hold it in frankalmoigne, because since the Statute of *Quia Emptores*, 18 Ed. 1, c. 1, he cannot hold it of the grantor, unless under a license granted by virtue of the 1 & 2 Ph. & M. c. 8, s. 54.(s)

A tenement in frankalmoigne is not only exempted from all temporal services, but the lord of whom he holds is likewise bound to acquit him of every service and fruit of tenure, which the lord paramount may demand of the land holden by this tenure.(t)

762. Spiritual tenure is twofold, namely, tenure by frankalmoigne, and tenure by divine service ; and the services to be performed are either spiritual, as prayers to God, or temporal, as the distribution of alms to the

(o) Rob. Gav. 234.

(p) Litt. Ten., sect. 265 ; 1 Inst. 175.

(q) *Launder v. Brooks*, Cro. Car. 562 ; Lamb. 595 ; Rob. on Gavelk. 41 et seq.

(r) 1 Inst. 93, 95.

(s) Id. 98 ; 2 Inst. 502.

(t) 1 Inst. 99, 100.

poor,^(u) as in the latter case is the office of the queen's almoner,^(x) which is usually given to the Archbishop of York, with the title of Lord High Almoner.^(y) As the manner of celebrating *divine service has been altered by several statutes, it is sufficient if a tenant in frankalmoigne perform such divine service as may now lawfully be performed.^(z)

As the divine service which ought to be performed is never ascertained by the deed on creating the tenure of frankalmoigne, no distress can be made, although it be not performed; but in default of performance, the defaulter is amenable to the ordinary or visiter, who may punish him for the same.^(a) But tenure by divine service differs from that of frankalmoigne in respect of the certainty of the services to be performed, and of the remedy by distress to which such tenants are liable on non-performance of the stated services. Fealty also is incident to divine service, though not to frankalmoigne. Neither of these tenures can be created by a subject at this day, in consequence of the above-mentioned statute 18 Ed. 1, and the 12 C. 2 expressly provides that frankalmoigne shall be subject to no other or greater services than it was before.

[*605]

*CHAPTER III.

COPYHOLD, AND OTHER LIKE TENURES.

SECT. I.

§ 764. COMMON COPYHOLDS.

SECT. II.

§ 919. PRIVILEGED COPYHOLDS.

§ 763. There are three kinds of tenure of lands still existing, being excepted from the 12 C. 2, c. 24, which, from the nature of the services to be performed, were considered of base tenure, and still retain many vestiges of their original; these are tenure by copy of court-roll, or copyholds derived from pure villenage, customary freehold, and tenure in an ancient demesne, which two are species of privileged villenage.

^(u) Id. 95.^(x) Id. 94.^(y) Harg. Co. Litt. 94, a., n. (6).^(z) 1 Inst. 95, b.^(a) Litt., sect. 136; 1 Inst. 96, a.

SECTION I.

COMMON COPYHOLDS.

764. This branch of the subject comprehends the following particulars entitled to notice :—

1. What is a copyhold, and the requisites thereto.
2. Incidents to copyholds.
4. Demise of copyholds.
4. Rights and interests of lord and tenant.
5. Estates in copyholds.
- *6. Alienation of copyholds.
7. Extinguishment of copyhold tenure. [*606]
8. Injuries in respect of copyhold lands, and their remedies.(a)

I. What is a Copyhold, and the Requisites thereto.

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| <p>§ 765. Definition of a Copyhold.
What necessary to constitute a Manor.</p> <p>766. Copyhold not grantable in this Day.</p> <p>767. Remains Copyhold after Severance, when.</p> <p>768. Copyhold must be at all Times demisable.</p> | <p>§ 768. Though it may not have been always demised.
In case of Escheat.</p> <p>769. Rights and Liabilities of Copyholder regulated by Custom.
What Customs shall be deemed reasonable.</p> |
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§ 765. A copyhold is where a man is seised of a manor, in which there is a custom that has existed time out of mind, that certain tenants within the same have used to hold lands and tenements at the will of the lord, according to the custom of the manor, and they are called tenants by copy of court-roll, because they have no other evidence concerning their tenements than the copies of the court-roll.

To constitute a copyhold four things are essential, viz.—1. To be time out of mind; 2. To be parcel of a manor; 3. Demisability; and 4. Custom.

1. *To be Time out of Mind.*

766. A copyhold ought to be time out of mind, for it cannot begin at this day; therefore, if the lord grants land by copy, what has not been granted before, it is no copyhold,(b) though it continues in grant for any number of *years short of fifty,(c) and held, that the lord, though he afterwards granted it for a further term of years, might, nevertheless, enter as [*607]

(a) Bract., l. 2, c. 8, fol. 26; Calth. on Copyh. 51, 54; and see Reay v. Huntington, 4 East, 276.

(b) Kempe and Carter's case, 1 Leon. 56.

(c) Taverner and Cromwell's case, 3 Leon. 107.

upon a tenant at will;(*d*) but a continuance in grant for upwards of fifty years without interruption was held to fix a customary interest.(*d*)

2. *To be Parcel of a Manor.*

767. A copyhold ought to be parcel of a manor, or within a manor,(*e*) but it is not necessary that it continue parcel, for if the lord grants the inheritance of all the copyholds within the manor, whereby they are severed from the manor, yet the copyholds remain;(f) so, if the lord grants the inheritance, it remains copyhold, and shall pay rents, heriots, and other services to the feoffee, and shall be subject to forfeiture for alienation, &c., as before; but suit of court and fine upon alienation are gone, and if such copyholder will alien, there is no means but by a decree in Chancery.(g)

3. *Demisability.*

768. So, a copyhold ought to be at all times demised or demisable,(*h*) and it must have been so time out of mind;(i) and it cannot be created by operation of law, and therefore, where wastes are severed from the manor, by a grant of the latter with exception of the former, the copyhold is become freehold, though the copyholders continue to have a right of common in the waste by immemorial custom, and the land will be freehold, and not continue copyhold.(i)

But it is sufficient if it be demisable, though it have not always been demised;(k) therefore, if the lord holds a copyhold, which escheats to him, in his hands for many years, he may afterwards demise it by copy;(l) so, [*608] if it comes into his hands by any other means,(l) and his heir or assignee may afterwards regrant it;(l) so, if a copyholder takes a lease or other estate of the manor, or of his copyhold, whereby his copyhold is destroyed, yet the land may afterwards be granted by copy, for it was always demisable;(m) so, if a lord after a copyhold escheats, demises the manor and the escheated tenements by express word, yet it may afterwards be granted by copy, for it was always demisable;(n) for the demise of the manor includes that copyhold as parcel of the demesnes, and the naming of it signifies nothing;(n) but if the lord leaves such escheated copyhold for life or years, or conveys it for any other estate except at will, it cannot afterwards be granted by copy, for it was not always demisable;(o) so, if he make a feoffment, and afterwards enters for a condition broken;(p) so, if the queen, being lady, by letters-patent grants an escheated copyhold, &c., not knowing of it, it shall be the same, though she was deceived;(q) so, if the land is extended upon a statute or recognizance acknowledged by the lord, or the wife of the lord has the land assigned to her for her dower, the land

(d) Id. 108.

(e) 1 Inst. 58, b.

(f) Melwich's case, 4 Co. 26 b; S. C. nom. Melwich v. Luther, 1 Cro. El. 102.

(g) Copyhold cases, Ca. 10; 4 Co. 25 a.

(h) 1 Inst. 58, b.

(i) Revell v. Joddrell, 2 T. R. 415.

(k) 1 Inst. 58, b; French's case, 4 Co. 31.

(l) 1 Inst. 58, b.; French's case, 4 Co. 31.

(m) French's case, sup.; Sav. 70, pl. 145.

(n) Lee v. Boothby, Cro. Car. 521.

(o) French's case, 4 Co. 31, a; Lee v. Boothby, sup.

(p) French's case, sup.

(q) W. Jo. 449

can never after be granted by copy ;(q) for although these impediments are by acts in law, yet, being lawful interruptions, the land cannot be granted any more by copy ;(r) *sed secus* if by a wrongful act it has ceased to be demisable, for when such act is avoided the land may be re-granted by copy ;(r) as if a copyhold has been recovered by false verdict, or an erroneous judgment ;(r) so, if a husband, seised of a manor in right of his wife, grants by indenture an escheated copyhold, &c., the wife after his death may regrant it by copy ;(s) so, the same law is, if tenant for life lets a copyhold, parcel of a manor, *and dies, it shall not destroy the custom [*609] as to him in reversion ;(t) see also further, post, §§ 839 et seq.

4. Custom.

769. Custom has been said to be the life and soul of copyhold tenure ;(u) for what a copyholder may and ought to do, or not to do, the custom of the manor directs ;(v) for although a copyholder is called a tenant at will, yet he is so *secundum consuetudinem manerii*, and it is held that these words were not to bound the lord's pleasure in the determination of his will, but meant only, that the tenant, as long as he continued tenant, was to hold the land under those terms and conditions which the custom had established ;(x)

Customs, so far as they relate to copyholds, are either general or particular : general customs extend to all kinds of manors, they are the *lex loci*, of which the courts take notice ;(y) but particular customs, which are peculiar to some manors only, must be specially pleaded, and will be construed strictly. A custom must be immemorial ;(z) therefore a privilege attached to an ancient messuage cannot be claimed in respect of a tenement recently built ;(a) so, it must be reasonable, and if not contrary to reason may be allowed ;(b) so, it is sufficient to show that it is reasonable in its commencement, and it need not be intended to have a lawful commencement by grant, &c. ;(c) see further as to custom and prescription, post, TITLE TO THINGS REAL.

A custom may be reasonable, though it be contrary to a rule or maxim of law, as the custom of gavelkind or Borough-English, (see ante, §§ 749. 753 et seq.) So, a custom may be reasonable, though there be a general provision by statute to the contrary, if the custom is not expressly *taken away, as a custom that a tenant within the Cinque Ports shall not be in ward ;(d) so, a custom shall be reasonable, though the right of another be restrained, as a custom that all the inhabitants of a vill shall grind all the corn they use at the lord's mill ;(e) but a custom for inhabitants to grind all their grain whatsoever by them spent or sold was held to be void ;(f) see

(q) W. Jo. 449.

(r) French's case, sup.

(t) Conesbie v. Rusky, Cro. El. 459 ; see also 2 Roll. Abr. 271.

(u) Browne's case, 4 Co. 21.

(x) 1 Str. 452.

(z) Co. Cop., s. 33 ; Jackman v. Hoddesdon, 1 Cro. El. 352.

(a) Dunster v. Tresider, 5 T. R. 2.

(c) Gateward's case, 6 Co. 60 b.

(e) 1 Roll. Abr. 559.

(f) Harbyn v. Greene, Hob. 189 ; see also Coryton v. Litheby, 2 Saund. 112 ; Chapman v. Flexman, 2 Vent. 288 ; Ld. Uxbridge v. Staveland, 1 Vez. 56.

(s) Conesbie v. Rusky, Cro. El. 459.

(v) 1 Inst. 63, a.

(y) Dav. 31 b ; Salk. 184.

(b) 1 Inst. 62, a.

(d) Dy. 288, 289 ; Palm. 543.

further as to customs, post, *TITLE TO THINGS REAL*; and as to the statutory provisions respecting copyholds, see Dig. P. i. ii. tit. Copyholds.

II. Accidents to Copyhold Tenure.

The fruits and appendages of copyhold tenure, which are all reserved by the 12 C. 2, are fealty and services, fines, reliefs and heriots, wardship and escheats.

I. Fealty and Services.

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|---|---|
| § 770. What Fealty was and is. | § 772. Suit by Joint-tenants and Coparceners. |
| 771. By whom Suit of Court may be done. | 773. Different Kinds of Rent. |
| 772. Suit of Court may be done by Attorney, when. | 774. Loss of Rent. |
| Suit by Women. | 775. Apportionment of Rent. |
| Suit by Corporations. | 776. Recovery of Rent by Distress. |
| | Time no Bar to a Distress, when. |

§ 770. Fealty, which was common to every species of tenure, except frankalmoigne, signifies the oath which was administered to every tenant of fidelity to the lord, and to do suit at his court; (g) the neglect of it might be [611] distrained for, (h) *which was formerly much insisted on, (i) and could not be done by attorney, (j) nor by an infant in person, (k) but is now usually respited by a small payment, and entered as respited, (l) and equity has in some instances relieved against the consequences of such neglect. (m)

The word "service," in its largest sense, comprehends not only fealty but also heriots and reliefs, &c., but in a restricted sense is confined to suit of court and certain rents.

1. Suit at Court.

771. As to suit of court, every copyholder was and still is bound to attend the lord's court, and to perform the duties of a homager, and it seems that the lord may hold a court as frequently as he pleases, if custom has not fixed the periods; (n) and if a copyholder resident within the manor does not appear nor essoin, after a general notice affixed on the church door, he may be amerced. (o)

(g) Co. Cop., ss. 19 et seq.

(i) 1 Inst. 92.

(k) Combe's case, 9 Co. 76 a; Floyer v. Hedgingham, 2 Chan. Rep. 56.

(l) Harg. Co. Litt. 68, b, n. (5).

(m) Cox v. Higford, 2 Vern. 664; citing Cudmore v. Raven, Ib., cited Prec. in Chanc. 574, nom. Edmore and Craven.

(n) Co. Cop., s. 31; 2 Watk. on Cop. 19.

(o) Belfield v. Adams, 3 Bulstr. 80; S. C. nom. Southcot v. Adams, 1 Roll. Rep. 256.

(h) Crawley v. Kingsmill, Noy, 24.

(j) Id. 93.

772. Suit of court by freehold tenants may be done by attorney, but the tenant cannot make an attorney by parol ;(*p*) copyholders cannot make suit by another, as they are not within the 20 H. 3, c. 10, (*q*) but if a copyholder be dwelling at a distance from the manor, a general notice of the holding the court is not sufficient to make his absence a wilful refusal or "cause of forfeiture," (*q*) unless he is living at an inconvenient distance, in which case notice to his bailiff is sufficient ;(*q*) so, illness, or the discharge of a great office, are good excuses of absence. (*q*)

*Suit may be done by a feme sole or a widow in a customary court, but a woman cannot sit on the homage to try issues in a court- [*612] baron at common law, where the suitors are judges ;(*r*) so, a widow cannot make presentment unless the husband died without an heir. (*s*)

A corporation cannot do suit, because they can only do it by attorney, and whether a corporation can hold lands by copy of court roll is not decided. (*t*)

Joint-tenants and coparceners are but as one tenant to the lord, and shall therefore do but one suit, (*u*) except where the lands are held of the queen, (*v*) but tenants in common take several estates, and must severally do suit. (*w*)

2. Rents.

773. Rents reserved by the lord are called, generally, rents of assize, because they were usually assized or reduced to a certainty, and are thus distinguished from the rents for life, years, or at will, which are variable and uncertain ;(*x*) and these were reserved equally on the grants of freehold as on those of copyhold lands ;(*x*) but those paid by freeholders are called "chief rents ;" if the rent reserved was in lieu of all services, it was on that account called a quit rent, (*x*) and being usually paid in silver was called "white rent," in distinction from that paid in specie, as pepper, cummin, &c., which was called "black rent," see further, ante, § 154.

774. A rent originally reserved in respect of copyhold property may be lost by suffering it to be received for many years by the lord of another manor, as may happen where two manors become united in one person, and afterwards get again into the hands of different owners ; thus, [*613] *where the lord of the manor of D., which he purchased from B., who was formerly owner of both I. and D., brought his bill to compel payment of rent out of a copyhold held of the manor of I., though he had no other evidence to show for it but that it had been paid to him for twenty years, the Court decreed to him the arrears, *Steward v. Bridger* ;(*y*) and it was there said, that in case of encroachment of rent, if the tenant make but one payment of more than is due, he shall never go back from it. (*z*)

775. The doctrine of apportionment of rents is, as a rule, applicable to

(*p*) Kitch. 145.

(*q*) Sir John Braunche's case, 1 Leon. 104.

(*r*) 2 Inst. 119 ; Gilb. Ten. by Watk. 357, 475, (N. 10, 168).

(*s*) F. N. B. 159 ; 2 Watk. Cop. 69, 70 ; 1 Scriv. Cop. 432.

(*t*) Co. Cop., s. 49 ; 1 Ca. and Opin. 186 ; Duke Char. Us. 24, by Bridgman, 135.

(*u*) Kitch. 108.

(*v*) F. N. B. 159, L.

(*w*) Bruerton's case, 6 Co. 1.

(*x*) 2 Inst. 19.

(*y*) 2 Vern. 516.

(*z*) *Steward v. Bridger*, 2 Vern. 516.

copyholds ; therefore, a lord seised in fee may, on a re-grant of copyholds, apportion the rent, in the same manner as in the case of freehold lands held by an ancient quit rent ;(a) the effect of such apportionment being a release and extinguishment of the residue of the rent as to the particular lands re-granted ;(b) but see as to cases where the rents can or cannot be apportioned in a re-grant of escheated copyholds, Co. Cop., s. 41, tr. 91.

776. The lord may distrain for rents of assize of common right ;(c) and by the 4 G. 2, c. 28, s. 5, all persons have the like remedy by distress for rents of assize, chief rents, and rents seck, as in case of rents reserved upon lease, and the lord may distrain the copyholder, or he may seize the land.(d)

So, the lord of a manor may avow for a rent issuing out of a copyhold, for rent is a duty at the common law.(e)

In *Eldridge v. Knott*,(f) it was held, that no length of time within the period limited by the 32 H. 8, c. 2, (one of the old Statutes of Limitations, see Dig. P. iii. tit. Limitations,) for the recovery of customary rents, is a bar to a distress for quit rents ; and mere length of time, unaccompanied [*614] *with any circumstances, is not of itself a sufficient ground to presume a release or extinguishment of such a rent ; and in that case it was added, that a presumption from mere length of time in support of a right, was very different from a presumption to defeat a right.(g)

Copyholds not being within the 32 H. 8, c. 37, the arrears of rent for copyhold tenements cannot be recovered by executors in an action, or by distress under the provisions of that act.(h) As to remedies in equity for lords of manors, see post, § 903.

(a) Kitch. 170.

(b) *Reay v. Huntington*, 4 East, 271.

(c) Litt., sect. 213 ; 1 Inst. 142, a.

(d) *Rivet v. Dowe, Noy*, 135.

(e) *Laughter v. Humphrey*, Cro. El. 524.

(f) *Cowp.* 214.

(g) *Eldridge v. Knott*, *Cowp.* 214.

(h) *Ognel's case*, 4 Co. 50 ; *Appleton v. Doily*, Yelv. 135 ; S. C. nom. *Appleton v. Baily*, 1 Brownl. 102 ; *Sands v. Hempston*, 2 Leon. 109 ; S. C. nom. *Executors of Sir Wm Cordel*, Id. 252 ; S. C. nom. *Earl of Westmoreland's case*, 3 Leon. 59.

II. *Fines.*

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| <p>§ 778. Fine due on Change of Tenant or Lord.
On Change of Tenant.
On Change of Lord.</p> <p>779. Persons from whom due.
From the Heir.
From Devisee of Heir.</p> <p>780. Fine due from Surrenderer.
from Vendee in case of Trust for Sale.</p> <p>781. Fine due from Remainderman.</p> <p>782. Persons having legal or equitable Estate, when not liable to pay Fine.</p> <p>783. Executors, &c., liable, or otherwise. Tenant in Dower or by Curtesy.</p> <p>784. Joint-tenants.
Coparceners.</p> <p>785. Tenants in Common to pay distinct Fines.
Distinct Fines payable on several Tenements.</p> <p>786. Commissioners of Bankrupt.</p> | <p>§ 786. In the case of an Extent, &c.</p> <p>787. General and special Occupancy.</p> <p>788. Fine certain.</p> <p>789. Fine uncertain.
Fine must be reasonable.</p> <p>790. What is a reasonable Fine, or otherwise.</p> <p>791. Amount of Fine in case of Tenants for Life, &c.
Fines on Renewal of Lives.</p> <p>792. Fine to be assessed by Lord or Steward.
By the Homage.</p> <p>793. Several Fines in case of several Services.</p> <p>794. Place of Assessment.</p> <p>795. Entry of Assessment on the Rolls.</p> <p>796. Demand of the Fine.</p> <p>797. Tender of the Fine.</p> <p>798. Payment of Fine certain.</p> <p>799. Payment of Fine uncertain.</p> <p>800. Payable by the Purchaser.
by Remainder-man.</p> |
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801. Means of recovering a Fine.

*§ 777. Fines payable to the lord were a burdensome incident to knight's service, which, on the abolition of this last tenure, were [*615] expressly reserved, by the 12 C. 2, to the copyhold tenure. On this subject the following points are entitled to notice, that is—

1. When and from whom the fine is due.
2. Quantity of the fine.
3. Assessment of the fine.
4. Demand, tender, or payment of the fine.
5. Recovery of the fine.

1. *When and from whom the Fine is due.*

778. A fine may be due either on the change of the tenant or of the lord. When the fine is due on the change of the tenant, it is immaterial whether it is by the act of God, as the death of the tenant, or by the act of the party, as by his alienation, and in this case it is said to be due without any special custom, being almost an incident to copyhold tenure,⁽ⁱ⁾ for this fine, when due on the death of the tenant, was of the nature of the primer seisin of knight's service before its abolition;^(k) and the fine on the alienation of the tenant was of precisely the same nature as the feudal burden which tenants in chivalry had been subject to before the 12 C. 2.^(l)

The fine due on change of the lord can only be where the change happens by the act of God, and not by the act of the party, and even in

(i) Grant v. Astle, 2 Dougl. 724, n.

(k) 2 Comm. 98.

(l) See Kitch. 103; Gilb. Ten. 292; Watk. on Cop. 286.

the first case it will not be due without a special custom ;(*m*) in the latter case, a custom to have a fine on any change of the lord of the manor, by alienation or demise, is against law, for by this means the tenant might be oppressed by a multitude of fines.(*n*) But where, by the custom of a manor, any fine is due on the death of the lord, held, that the customary general fine or *gressum*, as distinguished from the fines payable on the [*616] *death or alienation of the tenant, which are called "dropping fines," was not restricted to those claiming by descent, and therefore, that the husband, tenant for life under a marriage settlement was entitled to a fine upon the death of his wife, the last admitting lady.(*n*)

779. As to the persons from whom due, in the first place, if the copyholder dies, a fine is due to the lord, on the admittance of the heir, and that, it should seem, without any special custom, see ante, § 778; and if the heir die before admittance, this shall not prejudice the lord as to his fine; therefore, the heir or devisee of such heir cannot compel admittance except upon the payment of a double fine ;(*o*) so, in the case of a surrender by heir before admittance, see infra, § 780.

780. As a rule, if a copyholder surrender, a fine is due upon the admittance of the surrenderee ;(*p*) but if a copyholder in fee surrenders to the use of one for life, and the tenant for life dies, he may enter without any new admittance or paying any fine, for he has his old estate ;(*o*) so, if an heir of a copyholder surrender before admittance, yet he shall not prejudice the lord as to the fine due to him (see ante, § 779) upon the descent ;(*r*) so, if a surrender be on condition, by way of mortgage, the mortgagor, on paying the money before the condition broken, may re-enter without any new admittance, or paying a fine, for he is in of his old estate ;(*s*) so, if he surrender, reserving rent, with power of re-entry, if rent in arrear, no fine will be payable on such re-entry ;(*s*) but if the day appointed for the payment of the money be past, it seems that he must be re-admitted, having only an equity of redemption ;(*t*) so, if after condition broken, the lord insists on [*617] the mortgagee *coming in and paying the fine, equity will not relieve the latter.(*u*)

If copyholder surrenders to the use of his will and directs two trustees to make sale of his copyhold, and to apply the money to certain purposes, they may sell without being admitted, and the lord shall admit the vendee and have but one fine.(*v*)

781. If a copyholder in fee surrender to one for life, remainder to another for life, remainder to another in fee, by this but one fine is due, except by

(*m*) 2 Dougl. 724.

(*n*) 1 Inst. 59, b.

(*n*) Somersset (Duke) v. France, 1 Stra. 654; S. C., Fortes. 41.

(*o*) Morse v. Faulkner, 1 Anst. 13.

(*p*) Co. Cop., s. 56; 1 Inst. 59, b.

(*q*) Prodger's case, 9 Co. 107.

(*r*) Browne's case, 4 Co. 22, b.

(*s*) Gilb. Ten. 275.

(*t*) Id. 276; and see Fawcett v. Lowther, 2 Vez. 302.

(*u*) Tredway v. Fotherly, 2 Vern. 367.

(*v*) Holder v. Preston, 2 Wils. 400.

special custom ;(*w*) for the admittance of the particular estate is the admittance of him in remainder ;(*x*) so, when the particular tenant and the remainder-man join in a surrender, as their interests form but one estate, one fine only is due from the surrenderee ;(*y*) but if the person to whom the remainder is limited surrender his interest to another, a fine will be due on the admittance of such surrenderee ;(*z*) so, likewise, on admittance of the heir of the remainder-man ;(*z*) and it is said, that the lord may assess one fine for the particular estate, and another for the remainder, *Batmore v. Graves* ;(*a*) and in the same case it was added, "If a fine be assessed for the whole, there is an end of the business ; but if a fine be assessed for a particular estate only, the lord ought to have another."(*b*)

782. Persons having an equitable estate only, as *cestui que use* or *cestui que trust*, need not be admitted, and, consequently, cannot be called upon to pay a fine, for as to the *first, the Statute of Uses does not extend to copyholds,(*c*) and as to the second, he in whom the legal estate is [*618] vested, that is, the trustee, is properly the tenant of the manor ;(*d*) therefore, if a copyhold be devised to A. for the use of B., A., and not B., is the person to be admitted and pay the fine ;(*e*) so, on the same principle, if a copyholder covenant to surrender his land to A., and, before the surrender made, A. assign his right to B., the fine will be payable on B.'s admittance, and not on the covenant to surrender, for this transferred no legal, only gave him an equitable interest in the land ;(*g*) so, no fine is payable on the assignment, grant, or devise, of an equity of redemption, for on the breach of the proviso for redemption the mortgagee becomes the tenant, and is bound to pay the fine ;(*h*) so, neither can a fine be demanded of one having a mere authority, without any legal interest in the copyhold, as in the case of trustees with a power to sell, see ante, § 779 ; so, a guardian of an infant having merely a right to the pernanacy of the profits, shall pay no fine ;(*i*) so, if a copyholder be disseised, and enter upon the disseisor, or recover against him by plaint, he will be in of his old estate, and, consequently, no fine is due ;(*j*) or if a rightful owner of a copyhold release to one that is in by wrong, no fee will be due, he being already tenant.(*k*)

783. It was formerly holden that the executor of a copyholder for years should have the term without any new admittance ;(*l*) it is however now settled that, whenever a term for years is limited on surrender, or created by

(*w*) *Finch's case*, 4 Co. 22 ; *Barnes v. Corke*, 3 Lev. 308.

(*x*) *Ib.* ; see also *Blackburn v. Graves*, 1 Mod. 103. 120 ; S. C., 3 Keb. 263. 329 ; S. C., 1 Vent. 260 ; S. C., 2 Lev. 107 ; S. C., 2 Danv. 185.

(*y*) *Kitch.* 242 ; *Co. Cop.*, s. 26, tr. 130.

(*z*) 1 Burr. 213 ; *Gilb. Ten.* 417, *Walk. ed.*, n. (77.) (*a*) 1 Vent. 260.

(*b*) *Ib.* ; and see 1 Mod. 120 ; 1 Burr. 212 ; *Gilb. Ten.* 163, n. (*d*.) Also, as to contribution between the particular estate and the remainder-man, 1 *Watk. Cop.* 311 ; 1 *Serv. Cop.* 406. (*c*) *Cro. Car.* 44 ; 2 *Vez.* 257.

(*d*) *Gilb. Ten.* 157 ; 2 *Comm.* 331 ; 1 *Watk. Cop.* 289 et seq.

(*e*) *Bath (Earl) v. Abney*, 1 Burr. 206 ; see also *Rivet's case*, *Moor*, 890 ; *Trinity Coll. v. Browne*, 1 *Vern.* 441 ; *Allen v. Poulton*, 1 *Vez.* 121.

(*g*) *R. v. Hendon (Lord of the Manor)*, 2 T. R. 484.

(*h*) 2 *Vern.* 367 ; *Gilb. Ten.* 276.

(*i*) *Co. Cop.* s. 56.

(*j*) *Co. Cop.*, s. 56, tr. 129 ; 4 Co. 25.

(*k*) 4 Co. 25 b ; 1 *Inst.* 59, b

(*l*) *Haunchet's case*, *Dy.* 251 ; 3 *Leon.* 9 ; *Winch.* 3 ; *Gilb. Ten.* 289.

devise, the termor will be tenant to the lord, and his executors on his death must be admitted and pay a fine, Bath (Earl) v. Abney ;(*m*) [*619] in that case it was insisted that the executors took no new estate, and, as new tenants only, they were not liable to pay any fine, but the judge's certificate into Chancery decided otherwise.

Tenant in dower, or by the curtesy, where the custom allows of such estates, shall, it is said, pay a fine ;(*n*) but see 1 Watk. Cop. 300, where this is disputed.

784. Joint-tenants are seised *per mie et per tout*, therefore, if one die, the survivor shall have all without admittance or paying a fine ; for when one joint-tenant dies, the other takes his share, and continues in the original admittance ;(*o*) so, on an original surrender to two jointly, but one fine is due ;(*p*) and the same law applies to coparceners, who as being one heir are entitled to admittance on the payment of one ;(*q*) so, if joint-tenants and coparceners join in a surrender, only one fine is due on the admittance of the surrenderee ;(*r*) but as the customary heir or heirs of each coparcener must be admitted, the lord is of course entitled to fines on such respective admissions.

785. Tenants in common are to be admitted severally, and must therefore pay several fines,(*s*) although Lord Coke in his Copyholder, s. 56, and also Kitchen on Courts, 242, lay down a different ; but this is supposed in Attree v. Scott(*t*) to be a misprint, see also Plowd. 140 ; Perk., s. 107 ; so, the customary heirs of each must be admitted and pay several fines ;(*u*) but [*620] it is now settled, that if the several *undivided shares of copyhold heretofore belonging to tenants in common become united in one person, they form one entire estate, and one fine only would become due on the admission of the surrenderee, Garland v. Jekyll,(*v*) Holloway v. Berkeley,(*x*) overruling Attree v. Scott,(*y*) where it was held, that the multiplication of fines and services should continue notwithstanding such union. On the same principle as governs tenants in common, it has been held, that one fine cannot be assessed on the admission to several copyhold tenements.(*z*)

786. When copyholds prior to the 6 G. 4, c. 16, were included in the bargain and sale from the commissioners to the assignees of a bankrupt, the admittance of the assignees was necessary, and a fine due in consequence thereof ; but when the commissioners conveyed the copyholds immediately to a purchaser, a fine became due from him only.(*a*) By the 1 & 2 W. 4,

(*m*) 1 Burr. 206.

(*n*) Co. Cop., s. 56, tr. 123 ; Gilb. Ten. 223.

(*o*) Co. Cop., s. 35, tr. 82.

(*p*) Id. s. 56, tr. 130.

(*q*) R. v. Bonsall (Manor, &c.), 3 B. & C. 173 ;¹ S. C., 4 D. & R. 825.

(*r*) Gilb. Ten. 73, 330, n. (*f*) ; see also Co. Cop., s. 56 ; Calth. Read. 64.

(*s*) Fisher v. Wigg, 1 Ld. Raym. 631 ; S. C., 1 P. Wms. 21 ; S. C. 1 Salk. 391 ; Attree v. Scott, 6 East, 484 ; S. C., 3 Smith, 458.

(*t*) Sup.

(*u*) Br. Abr. tit. Feoffin. de Terres, pl. 45.

(*v*) 2 Bing. 273.^b

(*x*) 6 B. & C. 2 ;^c S. C., 9 D. & R. 73.

(*y*) 6 East, 484 ; S. C., 2 Smith, 458.

(*z*) Grant v. Astle, 2 Dougl. 122.

(*a*) Drury v. Mann, 1 Atk. 96.

¹Eng. Com. Law Reps. x. 47. ^bId. ix. 412. ^cId. xiii. 97.

c. 56, the copyhold estates of a bankrupt become vested in the assignees, without the necessity of any admittance, and the fine in consequence becomes payable by the purchaser.

If there be a custom for a copyholder's lands to be extended, the extendor upon his admittance shall pay the fine.(b)

787. The principle of general occupancy is not applicable to copyholds, the freehold never being out of the lord ;(c) but my Lord Coke says, "If a copyhold be granted *durante vitâ*, and the grantee dieth living *cestui que vie*, and a stranger entereth as a general occupant, he shall be admitted and pay a fine." In the case of special occupancy, which applies to copyholds without any custom in favour or it(d) a fine *is due upon the admission of the heir or other person, who is special occupant.(e) [621]

2. Quantity of the Fine.

788. Fines payable on the change of the copyholder may be certain and defined, or arbitrary at the will of the lord.(f) The fine is said to be certain, when the sum payable is fixed and ascertained by immemorial usage, in which case the lord is tied down by the custom and cannot exceed it ;(g) but the law will presume the fine to be uncertain until the contrary is proved, and this must be decided by the rolls of the court, in which the most ancient series of entries will be deemed true evidence of the fine, even though contradicted by a series of entries for a period of a hundred years past or more, indicating a different sort of fine ;(h) and a few instances of uncertain fines will be considered of no weight either way ;(i) a fine certain may, however, not always be a gross sum, as five or ten pounds, but it may depend upon the value of the land, as to pay for the fine such sum as the land may be worth by the year at the time of admittance, which being easily ascertained by the jury, is considered to be equally certain as a sum in gross ;(k) and a custom to have a year's value, generally, for a fine, has been held to be good.(k)

789. A fine is said to be uncertain and arbitrary when it depends upon the will and pleasure of the lord, or other person having a right to assess it. But though it is uncertain, it is not altogether arbitrary, for it ought to be reasonable, otherwise the copyholder is not compellable to pay it ;(l) and *whether a fine be reasonable or not shall be determined by the justices upon the circumstances appearing in the case ;(m) and, there- [*622]

(b) Co. Cop., s. 56.

(c) Ven v. Howell, 1 Roll. Abr. 511 ; Smartle v. Penhallow, 6 Mod. 63 ; S. C., 1 Salk. 183 ; Zouch v. Forse, 7 East, 186.

(d) Lemprière v. Martin, 2 Bl. 1148.

(e) Co. Cop., s. 56, tr. 128 ; Gilb. Ten. 327.

(f) 2 Comm. 98.

(g) Allen v. Abraham, 2 Bulstr. 32.

(h) Ib.; see also Lord Gerard's case, Godb. 265 ; 1 Watk. Cop. 306.

(i) Litt. Rep. 252.

(k) Perkins v. Titus, Skinn. 247 ; S. C., Carth. 12 ; S. C., 3 Lev. 249 ; S. C. Comb. 43 ; S. C., 3 Mod. 132 ; S. C., 2 Show. 507 ; Ca. 463 ; S. C., 1 Freem. 494 ; Ca. 669.

(l) 1 Inst. 59 ; Hubbard v. Hammond, 4 Co. 27 ; S. C. nom. Dalton v. Hamond, Cro. EL. 779 ; S. C., Moor, 662 ; S. C., 1 Roll. Abr. 507 ; see also Co. Cop. 160 ; Gilb. Ten. 219 ; 1 Mod. 120 ; 1 P. Wms. 63, 66 ; 2 Dougl. 729.

(m) Hubbard v. Hammond, 4 Co. 27 ; Moor, 623.

fore, if an action be brought against the tenant by the lord, it shall be referred to the court upon demurrer; *(n)* or the defendant may plead not guilty, and upon proof of the land and other evidence, the Court will decide; *(o)* but if a copyholder prays a mitigation, it does not conclude him, but he may afterwards insist on the unreasonableness of the fine; *(p)* the copyholder is however bound to show, that the fine is unreasonable. *(q)*

790. As a rule, two years' improved value is held to be a reasonable fine on admission to copyholds of inheritance, or for lives when renewable, *Halt v. Hassel*; *(r)* see also *Willowes' case*, *(s)* where two years' value was deemed unreasonable, *Hubbard v. Hammond*, *(t)* *Jackman v. Hoddesdon*, *(u)* *Wharton v. King*; *(x)* deducting quit rents, but not land-tax, *Grant v. Astle*; *(y)* see also *Allen v. Abraham*, *(z)* *Dow v. Goulding*, *(a)* *Stower v. Smith*, *(b)* *Accledon v. Kinnesley*, *(b)* *Lake v. Jetherell*, *(b)* and other cases; *Morgan v. Scudamore*, *(c)* *Middleton v. Jackson*; *(d)* where a year and a half's improved rent has been held to be the *maximum* in common cases. On alienation, it is said, that by custom the lord shall not be restricted to two years' value, for he may take four, five, or even seven years' value; *(e)* so, where a fine is payable by custom on the first purchase only, the lord is [*623] not restricted as to the amount of the fine; *(e)* so, not on the *grant of lands coming into the lord's hands by escheat, for the re-grant being voluntary on his own part, he may fix his own terms, and the person soliciting the grant may accept or reject them as he pleases; *(f)* so, not to copyholds for lives, &c., see 1 *Watk. Cop.* 308.

791. As to the amount of fine where there is an admission of tenants for life, and persons in remainder, &c., at the same time, the tenant for life is to pay one whole fine the same as tenant in fee, and the person in remainder is usually required to pay half the amount of the fine payable by the tenant for life; *(g)* but where there are more lives than one to take in succession, it is said, in *Bath (Earl) v. Abney*, *(h)* "The fine for two lives is the *sesqui* of that taken for one, and the fine for three is the *sesqui* of that taken for two, by the usage of the manor," and this is understood to signify that "The fine for the third life is the half of that taken for the second life;" *(i)* so, the usage in most manors on a renewal of copyholds for three lives, is to take for the first life a year and a half's value, for the second life half as much as the fine for the first, and for the third life half as much as the fine for the second; *(k)* but in *Wilson v. Hoare* *(l)* it has been held, that the proper mode of assessing a fine upon the admission of joint-tenants to a copyhold of

(n) Co. Ent. 647.

(o) *Hubbard v. Hammond*, sup.; *Denny v. Leman*, *Hob.* 135.

(p) 1 *Roll. Abr.* 507.

(q) *Hob.* 135.

(r) 2 *Str.* 1042.

(s) 13 *Co.* 1.

(t) Sup.

(u) *Cro. El.* 351; *S. C.*, 1 *Roll. Rep.* 75; 1 *Inst.* 60.

(x) 3 *Anst.* 673; *S. C.*, 3 *Swanst.* 666.

(y) 2 *Dougl.* 722.

(z) 2 *Bulst.* 32.

(a) *Cro. Car.* 196.

(b) *Toth.* 164.

(c) 2 *Chan. Rep.* 134.

(d) 1 *Chan. Rep.* 33.

(e) *R. v. Dillington*, 1 *Freem.* 496; *S. C. nom. R. v. Dilliston*, 1 *Show.* 31; 1 *Salk.* 386; 3 *Mod.* 221.

(f) 13 *Co.* 3; *Hetl.* 6; 1 *Watk. Cop.* 308.

(g) 1 *Watk. Cop.* 311.

(h) 1 *Burr.* 267, 207, marg.

(i) *Per Ld. Tenterden*, *C. J.*, *Wilson v. Hoare*, 2 *B. & Ad.* 350.

(k) 1 *Watk. Cop. sup.*; 1 *Scriv. Cop.* 387, 3d ed.

(l) Sup.

inheritance was, to take two years's improved value for the first life, for the second life one-half the sum taken for the first, and for the third life one-half the sum taken for the second and so on.

3. *Assessment of the Fine.*

792. As to the assessment of the fine, it is necessary to consider by whom it may be made, manner and place of making and entry of the assessment.

*It belongs of common right to the lord or his steward to assess the fine; (*m*) but a custom that a copyholder for life *in extremis* [*624] may nominate a successor to have the copyhold, paying a reasonable fine, to be agreed upon with the lord, or if that fail, to be assessed by the homage, has been adjudged to be a good custom; (*n*) so, to nominate one or two as successors. (*o*)

793. If a copyholder holds several copyholds by several services, there ought to be set upon every one a several fine; (*p*) and there is no distinction in that respect between a customary heir and a surrenderee, nor is it material whether the admission be contained in one or several copies; (*q*) and in *Snag v. Fox* (*r*) it was held, that a surrender by a copyholder to particular uses, under which his son should be admitted in tail, would operate as a severance of the estate from any other lands left to descend to such son, so as to entitle the lord to separate fines.

One gross sum cannot be assessed on the admission to several copyhold tenements, *Grant v. Astle*; (*s*) and in this case it was also held, that, being so stated in the declaration, it was error, and not cured by verdict. (*t*)

794. In one case it was held, that a fine might not only be assessed but might be made payable out of the manor; (*u*) *but this, which was the case of a fine for license to alien, appears to be the only authority for such a position. (*v*) [*625]

795. The entry of the assessment on the rolls is not necessary to entitle the lord to the fine, but a demand on behalf of the lord, it being a reasonable and legal fine, is sufficient; (*x*) but if an entry be made of an assessment, it must be of the sum actually assessed, without regard to any sum remitted by the lord; therefore, where the assessment was entered as of 100*l.*, but

(*m*) *Lord Northwick v. Stanway*, 6 East, 57; S. C. nom. *Lord Northwick v. Stanton*, 2 Smith, 226. (*n*) *Yelmester Custom*, cited Noy, 2.

(*o*) *Crabb v. Bales*, Id. 3; S. C., come semble, nom. *Crabb v. Bevis*, 1 Roll. Abr. 48; see also *Ford v. Hoskins*, Cro. Jac. 368; 1 Freeman 494; *Freeman v. Phillips*, 4 M. & S. 486.

(*p*) *Hobart v. Hammond*, 4 Co. 27; S. C. nom. *Dalton v. Hammond*, Moor, 622; S. C., Cro. El. 779.

(*q*) *Taverner and Cromwell*, 4 Co. 27 a; *Hitch v. Wallis*, cited 2 Dougl. 729; see also Co. Cop., s. 56, tr. 131; Gilb. Ten. 218; *Whitfield v. Hunt*, cited 2 Dougl. 727 b, n.; *Searle and Marsh*, cited in *Everest v. Glynn*, 6 Taunt. 428; S. C., 2 Marsh. 84.

(*r*) Palm. 342.

(*s*) 2 Dougl. 721.

(*t*) *Grant v. Astle*, 2 Dougl. 721.

(*u*) *Yaxley v. Rainer*, 1 Ld. Raym. 44.

(*v*) See 1 Watk. Cop. 317, 318; 1 Scriv. Cop. 418.

(*x*) *Lord Northwick v. Stanway*, 6 East, 56; S. C., but not S. P., 3 B. & P. 346.

that out of special favour the lord remitted 40*l.*, and thereby reduced it to 60*l.*, and the lord sued for the fine, and the jury finding the annual value of the premises 30*l.*, gave a verdict for 60*l.*, held, that the lord could not retain this verdict, but must be nonsuited, the Court being of opinion that the assessment, notwithstanding the *remittitur* was an assessment of 100*l.*, and the latter part of the entry was nothing more than a remission of the payment of part of that assessment; and it was observed in this case that much mischief might arise to copyholders, if similar entries were permitted to be made upon the court rolls of manors.(*x*)

4. Demand, Tender, and Payment of the Fine.

796. After a regular assessment of the fine, the specified sum must be formally demanded by the lord or his steward;(y) and it must be made of the specific sum, and not of any larger amount, otherwise the lord cannot recover at law;(z) but if the lord demand more than he is entitled to, he may re-assess the fine, and make the demand *de novo*; so, it must be demanded of the person of the tenant.(a) By the 11 G. 4 & 1 W. 4, c. 65, re-enacting 9 G. 2, c. 29, the fine must be demanded of *femes covert* and infants, by the lord's bailiff or agent by note in writing, signed by the lord [*626] or his steward, and left with the infant or his guardian,*or with the *feme covert* or her husband, or with the tenant or occupier of the copyhold.

797. Where the fine is certain, the heir ought to tender it on his prayer to be admitted;(b) and to save a forfeiture, it seems that the tender should be made at the day appointed by the lord for the payment of the fine assessed, and that a tender made at the time of the assessment is not sufficient;(c) but the lord cannot refuse admittance because the fine is tendered to him, even when the fine is certain in amount.(d)

Should the fine be unreasonable, or if the copyholder has good cause for thinking it to be so, he may refuse to pay it, and it shall be no cause of forfeiture,(e) but he must tender what he conceives to be due.(f)

798. A fine certain ought to be paid immediately, but not until the tenant is actually admitted, for admittance is the cause of the fine, and, therefore, the lord cannot refuse admittance until the fine is paid;(g) and if the heir choose to waive the possession, he shall pay no fine;(h) but if after admittance the tenant refuse to pay, the fine having been demanded, such refusal is a forfeiture,(i) see *supra*, § 796; and as to the provisions for the pay-

(x) Lord Northwick v. Stanway, 6 East, 56; S. C., but not S. P., 3 B. & P. 346.

(y) Trotter v. Blake, 2 Mod. 229.

(z) Titus v. Perkins, Skinn. 249.

(a) Denny v. Lemman, Hob. 135.

(b) Gardiner v. Norman, Cro. Jac. 617.

(c) *Ib.*; sed quære, and see 1 Scriv. Cop. 419.

(d) Hobart v. Hammond, 4 Co. 28; S. C. nom. Dalton v. Hamond, Cro. El. 779; S. C., Moor, 623; Fish v. Rogers, 1 Roll. Abr. 506.

(e) Hobart v. Hammond, *sup.*

(f) Gardiner v. Norman, *sup.*

(g) Hobart v. Hammond, *sup.*; Baddeley v. Leppingwell, 3 Burr. 1544; Rex. v. Hendon, (Manor, &c.) 2 T. R. 485.

(h) 1 Sid. 98.

(i) Hobart v. Hammond, *sup.*

ment of fines in the case of *femes covert*, infants, and lunatics, see 11 G. 4 & 1 W. 4, c. 65, Dig. P. ii. tit. Courts, (Equity.)

799. If the fine be uncertain, a copyholder is not bound to pay it immediately, for he cannot know how much it will be, and if the lord does not fix a time for payment, he shall have a convenient time. *(k)* A custom not to pay a fine till *of full age has been held to be a good custom; *(l)* so, [*627] also, a custom for the lord to seize until the fine is paid. *(m)*

In some manors it is customary not to take the fine until the succeeding general court, but it seems doubtful whether a lord or steward may refuse to accept a surrender from the person admitted tenant, or to admit the surrenderee until the fine is paid. *(n)*

800. The fine on admittance, and also the steward's fees on admittance, are payable by the purchaser; *(o)* therefore, held, that a covenant to surrender a copyhold to a purchaser, and to do all acts and deeds, &c., for the perfect surrendering and assuring premises at the costs and charges of the vendor, is not broken by non-payment of the admission fine, for the title is perfected by the admittance of the purchaser as tenant, the fine not being due until after admittance. *(p)*

Where by the custom a remainder-man must be admitted and pay a fine, the fine is not payable until the death of the tenant for life; *(q)* and he must come in within a reasonable time after the death, otherwise the lord may seize *quosque*, &c.; *(r)* but very clear evidence is required to establish the lord's right to a full fine from a remainder-man and the Courts lean to the presumption that a fine paid by a remainder-man was an apportionment only of the full fine assessed on the admission of the tenant for life. *(r)*

5. Recovery of the Fine.

801. If the tenant (not being a *feme covert*, infant, or lunatic, see *supra*, § 798) do not come in to be admitted and pay his fine, after the usual proclamations, the lord may, in all cases, seize the land *quosque*, &c.; see further as to *forfeiture of copyholds, *post*. So, if a copyholder refuse payment of a fine, debt lies against him, *(s)* and see further as to in- [*628]juries and their remedies, *post*, under that title.

(k) Hobart v. Hammond, *sup.*; Willowe's case, 13 Co. 2.

(l) Champion and Atkinson, 3 Keb. 90.

(m) Jackman v. Hoddesdon, Cro. El. 351.

(n) 1 Scriv. Cop. 419; 3d ed., 800.

(p) Graham v. Sime, 1 East, 632.

(q) Kitch. 244; Fitch v. Hockley, 4 Co. 23 a.

(r) Whitbread v. Jenny, 5 East, 531.

(o) Drury v. Mann, 1 Atk. 95.

(s) Grant v. Astle, 2 Dougl. 721.

III. Reliefs and Heriots.

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 814. Loss of Heriot Custom.
 No Extinction of a Heriot Custom.
 815. Recovery of a Heriot Custom.
 816. Pleadings in Replevin for a Heriot Service.
 What Pleas are bad.</p> |
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§ 802. Relief was a feudal burden common to knight's service and socage tenure, which was payable by the heir, by way of fine or composition with the lord for taking up the estate, which was lapsed or fallen in by the death of the last tenant.^(t) The term is also sometimes applied to copyholds;^(u) but it is said not to be properly a relief, but an alienation fine; and this may be either by tenure, by special reservation, or by custom.^(x)

*The remedy for a relief if it be by tenure is distress of common [*629] right;^(y) but, if it be by custom, there can be no distress unless there be a special custom to warrant it;^(z) an action of debt, however, lies in such case.^(z)

803. A heriot is a burden peculiar to this base tenure, and it is distinguished from the relief with which it is frequently confounded in the books, in this respect, that the heriot was payable on the determination of the tenancy, but the relief on the accession of the heir.^(a) The heriot is the best beast or other thing, due to the lord on the death of the tenant, and is distinguished into heriot service, that is, heriot by tenure and heriot custom, which differ from each other in the manner in which they become due, or are lost or recovered, and in other particulars.

1. Heriot Service.

804. The heriot service was originally a reservation by the lord, arising from the tenure subsisting between him and the tenant, and lies in *render*.

It is said to be due only upon the death of the tenant in fee simple;^(b)

(t) 2 Comm. 65.

(u) Manxel's case, Plowd. 91.

(x) Hungerford v. Havvland, 3 Bulstr. 323; S. C., 2 Roll. Rep. 370; S. C., W. Jo. 132; S. C., Latch, 37; Gilb. Ten. 173.

(y) Co. Cop., s. 31, tr. 45; Ognel's case, 4 Co. 47 b.

(z) Hungerford v. Havvland, ante, 620, n. (x).

(a) Fitzh. Heriot, pl. 6; Co. Cop., s. 25, tr. 33.

(b) 21 H. 7, 13 a.

but it may be reserved upon the grant of any less estate, as upon a lease for life, after the death of tenant for life : (c) so, if a lease be to A. for life, afterwards to B. for life, remainder to C. for life, a heriot may be reserved after the death of each of them ; (d) so, if a lease be for years, if two lives continue, it may be reserved after the death of each life ; (e) so, if tenant aliens a parcel, the heriot shall be multiplied, (f) and if the lord be seised of a heriot by the alienee, the same continues, though the tenant re-purchase this parcel ; (f) so, heriot service thus reserved *upon a lease is, like rent, incident to the reversion, and it shall go with the reversion to [*630] the heir, and not to the executors, (g) or to the grantee of the manor. (g) It is said, that the heriot being confined to personal chattels, is no charge on the land, any more than a relief or a fine on admittance to copyholds ; (h) but this can be said only of heriot custom, (i) or where there is no express reservation, see post, § 814.

805. If there be a lease for lives, rendering rent, and a heriot upon every death, and afterwards the manor is leased for years, the heriot goes with the reversion to the lessee ; (k) so, if a lease be for ninety-nine years, if two lives so long continue, to commence after a death, or surrender, &c., of a former lease, reserving a heriot after the death of each life, if either dies before the lease commences, no heriot shall be paid ; (l) so, for the last life no heriot can be seized, or levied by distress, but only by action upon the contract, for by his death the term is determined, *sed quære*. (m)

806. Heriot service lies in *render*, it may, therefore, be recovered either by seizure, distress, or action.

Heriot service, when part of the ancient tenure, may be seized, or the lord may distrain for it at his pleasure : (n) and it may be seized either in or out of the manor, for the property vests in the lord immediately on the death of the tenant, and therefore he may seize the property any where, just as he may his own property ; (o) and for this reason it has been holden, that the lord may seize a heriot in the *hands of the vendee, unless sold in *market overt* ; (p) but the lord can seize no other than the tenant's [*631] own beast, (q) although he may distrain any man's beast on the land ; (q) so, where on a lease for three lives, or ninety-nine years determinable on three lives, there is reserved for a heriot upon the death of each life his or their best beast, and the lease is assigned, and then one of the lives dies, the beast of the assignee cannot be seized, though the lessor may distrain upon the land for the best beast of the deceased tenant. (r)

(c) Osburne v. Sture, 2 Lutw. 1367.

(d) Lanyon v. Carne, 2 Saund. 167.

(e) Winch, 47 ; 2 Lutw. 1367.

(f) Fitz. Heriot, pl. 1.

(g) Lanyon v. Carne, 2 Saund. 167.

(h) Co. Cop., s. 24, tr. 24 ; Fitz. Avowrie, 233.

(i) See 8 H. 7, 10 b ; cited 2 Watk. Cop. 142, n. (c.)

(k) Winch, 47. 57.

(l) Lanyon v. Carne, sup.

(m) 2 Lutw. 1368.

(n) Woodland v. Mantel, Plowd. 96 ; Odiham v. Smith, 2 Cro. El. 589 ; S. C. Br. Hariot, 2 ; S. C. Moor, 540, reversing the judgment in C. P. ; And. 298 ; Austin v. Bennet, 1 Salk. 356 ; Parker v. Gage, 1 Show. 81 ; Edwards v. Moseley, Willes, 192.

(o) Woodland v. Mantel, sup.

(p) Kitch. 262.

(q) Dy. 199 b, pl. 57 ; Ow. 146 ; Major v. Brandwood, Cro. Car. 260.

(r) Lanyon v. Carne, 2 Saund. 165 ; S. C. nom. Langan v. Carne, 1 Lev. 294 ; S. C. nom. Lion v. Carew, 1 Ventr. 91 ; S. C. nom. Hangan v. Cawe, 1 Sid. 437 ; see also 2 Keb. 505.

807. If a heriot be reserved upon a lease or by deed, since the statute *Quia Emptores*, (under which no new tenures can be created,) payable by tenant in fee, it is considered as rent, and can only be recovered like rent by distress, or action of covenant or debt, but cannot be seised; *(s)* and the lord or lessor may distrain for a heriot the cattle of any stranger that are upon the land, and retain them until the heriot be satisfied; *(t)* and if not replevied, the lord may now sell them under the 2 W. & M. c. 5, see Dig. p. ii. tit. Distress; and if the tenant brings replevin, the avowry need not show the particular thing to which he is entitled as a heriot; *(t)* but if the grant be lost, the lord in avowry must prescribe, which supposes a grant; *(u)* but he need not now allege seisin in himself or his ancestor, he may avow generally under the 11 G. 2, c. 19, s. 22; *(x)* but the lord cannot distrain for heriot service out of the manor or lands demised. *(y)* So, an action of debt or covenant lies to recover a heriot reserved upon a lease. *(z)*

[*632] *808. Heriot service shall be extinct by unity of possession; *(a)* so, if the lord purchase parcel of the land, because it is entire and valuable; *(b)* *sed secus* as to the heriot custom, for if the custom of the manor be, that upon the death of every tenant of the manor, who dies seised of any lands held of the same manor, the lord shall have a heriot; although the lord purchases part of the tenancy, yet he shall have a heriot by the custom of the manor for the residue. *(c)*

So, if a tenant makes a settlement upon his son in marriage, it avoids the heriot, and is not fraudulent within the 13 El. c. 5, see Dig. p. ii. tit. Frauds; *(d)* but where a tenant, holding of several lords, make a fraudulent gift of his beasts, any lord may sue on the 13 El. for the value of all the beasts, *Cresswell v. Cokes*, *(e)* S. C., 2 Leon. 6, where it is said that he shall recover but the value of one.

2. Heriot Custom.

809. A heriot may be due, by the custom of a manor, from every tenant, which is called heriot custom; *(f)* so, there may be a customary composition in money, as ten or twenty shilling in lieu of a heriot, but a composition of this kind must be supported by immemorial usage; *(g)* a new composition, therefore, will not be binding on either lord or tenant. *(g)*

But the tenant must die tenant of the lord, yet it matters not whether he be tenant in fee, for life, or years; *(h)* so, by custom, a heriot may be due upon the deaths of some tenants and not upon the deaths of others within

(s) *Edwards v. Moseley*, Willes, 192.

(t) *Major v. Brandwood*, sup.

(u) 21 H. 7, 13 a, 15 a; *Kitch.* 262, 263.

(x) See 2 Wms. Saund. 168 a, n. (1); also Dig. p. ii. tit. Distress.

(y) 2 Inst. 132; *Austin v. Bennet*, 1 Salk. 356; see also *Osborn v. Sture*, 2 Lutw. 1367; S. C. nom. *Orborne v. Steward*, 3 Mod. 231.

(z) *Lanyon v. Carne*, 2 Saund. 167, &c., sup.

(a) 14 Il. 4, 5 a, cited Bro. Heriot, 8.

(b) 1 Inst. 149, b.; *Talbot's case*, 8 Co. 104.

(d) *Tyre v. Littleton*, 2 Brownl. 187.

(f) *Kitch.* 262 et seq.; Co. Cop., s. 24, tr. 24, 25.

(g) Co. Cop., s. 31, tr. 46; 2 Comm. 424.

(c) Id. 106.

(e) Dy. 151.

(h) Bro. Hariot, 1.

the same manor, as the heriot is due in respect of the land ;(i) so, if a man dies tenant of several heriotable tenements, he shall pay several heriots ;(i) but, by the custom of some manors, one *heriot only is due in such case ;(k) so, a heriot shall be due although the testator devises all [*633] his goods ;(l) so, as the heriot is due on the death of the tenant, or the person in legal possession, it is due on the death of the trustee, and not of the *cestui que trust* ;(m) so, it is due on the death of the reversioner, both as to freehold and copyhold estates, for he is equally in the seisin as a person in possession.(n)

So, it seems, that though as a rule a corporation can never die, and therefore a heriot is not due in respect of copyhold lands in their possession, yet, by special custom, a heriot may be due on the natural death or avoidance of its head ;(o) so, on the death of a widow entitled to her free bench, the lord is entitled to a heriot.(p)

810. So, by custom, a heriot is due upon the determination of an estate for life,(q) or upon the determination of an estate for years ;(q) so, by custom, it may be due upon the surrender or alienation of the tenant ;(r) but if the surrenderor die before the admittance of the surrenderee, it will be due on the death of the former, the latter not being the lord's tenant until admittance ;(s) so, if a tenant enfeoffs several parts of heriotable lands, each shall pay a heriot, for they shall be multiplied ;(t) so, if a tenant enfeoffs the lord of part of heriotable land, the heriot custom shall not be extinct ;(u) so, if land escheats, &c. and afterwards is re-granted, for heriot custom, it is said, is not extinct by unity of possession, but see ante, § 808, as to heriot service. So, it seems, that the heriot, in case of disseisin, (or rather *of ouster as regards copyholds,) will be due on the death of the disseisee, not [*634] of the disseisor.(x)

811. Though a custom, that the lord shall have the best beast, &c. of his tenant who dies, is good, yet a custom or prescription to have a heriot of every stranger dying within a manor is bad, because it cannot have a reasonable commencement between the lord and a stranger, though it may between the lord and his tenants ;(y) so, a custom or prescription to have a heriot, that is, the best beast of his tenant, and if it be eloiigned before the

(i) Kitch. 262 ct seq.

(k) 2 Watk. Cop. 155, n. (1,) 278. 298 ; 1 Scriv. Co. 459, 3d ed.

(l) 1 Inst. 185, b.

(m) Trinity College (Camb.) v. Browne, 1 Vern. 441 ; Smartle v. Penhallow, 1 Ld. Raym. 1000.

(n) Br. Hariot, 1 ; Br. Avowrie, 142 ; Br. Entre Cong., pl. 20 ; Butler v. Archer, Ow. 152 ; 2 Watk. Cop. 149.

(o) 1 E. 2. 14 a ; Long's case, 5 Ed. 4. 72 b ; Fitz. Hariot, 7 ; 2 Watk. Cop. 155 ; 1 Scriv. Cop. 446, 3rd ed. (p) Gilb. Ten. 172 ; 2 Watk. Cop. 137.

(q) 21 H. 7. 15 b ; Kitch. 266 ; Bro. Heriot, 5 ; Keb. 80.

(r) 3 H. 6. 45 b.

(s) Kitch. 265.

(t) Bruerton's case, 6 Co. 1.

(u) 8 Co. 106 b.

(x) Co. Cop., s. 56, tr. 129 ; 44 Ed. 3. 13 ; 7 H. 4. 17 ; Kitch. 263, 264 ; Bro. Hariots, 1 ; Norrice v. Norrice, March, 23 ; S. C. nom. Norris v. Norris, 2 Roll. Abr. 2 ; see also 2 Watk. Cop. 146, 147.

(y) Parton v. Mason, Dy. 199 b ; Plowd. 95 ; Dav. 33 ; Parker v. Combleford, 1 Cr. El. 725 ; 2 And. 153.

lord seizes it, that then he may take the beast of any other person *levant and couchant* upon the land, is unreasonable and void.(z)

812. A heriot due on the death of a tenant is only where he is solely seised, and not where he is seised jointly with another, for joint-tenants being seised *per mie et per tout*, make altogether but one tenant to the lord, be there ever so many of them, therefore, no heriot is due until the death of the last surviving tenant:(a) and the rule is the same with respect to coparceners, who likewise make but one tenant;(b) so, where a grant is made of lands to one for life, with remainder to another for life, and remainder to a third in fee, the particular interest and the remainder form but one tenant, and consequently no heriot is due until the death of the survivor of them all.(c) On the other hand, tenants in common being solely seised, a heriot is due to the lord on the death of each of them;(d) but when their shares [*635] *are re-united in the same person, they form but one tenement, and consequently only one heriot is due in respect of them.(e)

813. A heriot is not due on the death of a person having only an *interesse termini*, as where a lease is made to two for ninety-nine years, if three persons should so long live, to commence at the expiration of an existing lease, at a certain rent, and rendering a heriot after the death of the lessees, or either of them, and one of the lessees die before the expiration of the first lease, a heriot could not be demanded, as there would be no reversion until the commencement of the term, and for want of a reversion the reservation could not take effect.(f)

In *Smartle v. Penhallow*,(g) a heriot was held not to be due on the death of an assignee of a bankrupt, but on that of the bankrupt himself.

814. If the tenant dies, having (without fraud) no beasts, then the lord shall lose his heriot.(h) and the best beast must belong to the tenant at the time of the death or alienation;(i) and this may apply to heriot service as well as to heriot custom, for it is said, "It is a casual thing if the lord have the heriot, unless such custom or tenure be to have the best beast, or such a sum;"(k) but if the tenant had conveyed away the beasts fraudulently, then the 13 El. c. 5, has provided a remedy.(k)

Unity of possession does not work an extinction of a heriot custom, as it does in the case of heriot service, see ante, § 804.

[*636] *815. The property in a heriot by custom vests immediately in the lord on the death of the tenant, or on an alienation by him, and

(z) *Parton v. Mason*, sup.; N. Bendl. 112, pl. 147; Moor, 16, pl. 53.

(a) *Kitch.* 264; *Butler v. Archer*, Ow. 152.

(b) *Lib. Ass.* 210 b; 3 *Leon.* 13; *Ca.* 30; *Eastwood v. Winke*, 2 P. Wms. 614; 2 *Watk. Cop.* 145, 149.

(c) *Keilw.* 83, sed quære.

(d) *Attree v. Scott*, 6 *East*, 481.

(e) *Garland v. Jekyl*, 273; *Holloway v. Berkeley*, 6 B. & C. 2; = S. C., 9 D. & R. 83.

(f) *Lion v. Carew*, 1 *Vent.* 91; S. C. nom. *Lanyon v. Carne*, 2 *Saund.* 165; S. C. nom. *Langan v. Carne*, 1 *Lev.* 294; S. C. nom. *Lemal v. Cara*, 2 *Keb.* 505; S. C. nom. *Hangan and Cawe*, 1 *Sid.* 437.

(g) 2 *Ld. Raym.* 1002; S. C., 1 *Salk.* 155; S. C., 6 *Mod.* 63.

(h) *Shaw v. Taylor*, 4 *Hob.* 176; S. C., *Hutt.* 4; *Carter*, 86; see also *Dy.* 199; *Kitch.* 264.

(i) *Kitch.* 267; *Gilb. Dist.* 146.

(k) *Per Curiam*, *Hutt.* 4.

it seems that it lies in *prender*, therefore the lord may seize it in any place either in or out of the manor, *(l)* but he cannot distrain for it, *(m)* for a prescription to distrain for his own goods is not good; *(n)* he cannot, however, seize the beasts of another, *(o)* and a custom to take the beast of another upon the land, if the heriot be eloigned, is void; *(p)* so, if the lord seizes the worst beast for the best, he must be content with his election, and cannot afterwards seize another; *(q)* and if a heriot be eloigned so that the lord cannot seize, he may have detinue or trover against him who detains it, *(r)* or, in certain cases, *assumpsit*. *(s)*

816. If the tenant brings replevin, the lord or lessor may, in the case of heriot service, avow generally under the 11 G. 2, c. 19, s. 22; *sed secus* as to heriot custom, for this has been held not to be within the statute, *(t)* therefore, in replevin as well as in trespass, if the defendant avows or justifies for heriot custom, he ought to allege the seisin of himself and of the tenant, the custom for a heriot, the death of the tenant, and seizure of the heriot; *(u)* and it is not sufficient to allege a custom to take the best beast, without saying for a heriot, or in the name of a heriot; *(x)* so, evidence of a custom for the homage to assess a certain sum of money as a heriot, and that such assessment had always been made with reference to the best chattel of the tenant, would not support an avowry for a heriot in kind; *(y)* so, a *plea which does not set out the custom with all exceptions, has [*637] been held bad; *(z)* so, where the custom set forth was, that the lord should have the best beast at the tenant's death, and the custom proved that he should have the best beast or good, the variance was held fatal; *(a)* so, where the plea stated a custom in the manor, that the lord, from time immemorial until the division of a certain tenement into moieties, had been accustomed to take a heriot upon the death of every tenant dying seised, and since the division, had been accustomed to take, on the death of every tenant dying seised of either of the moieties, a heriot for each moiety, held, that this must be taken to be one entire custom, and not two distinct customs, the one applicable to the tenement before, and the other after the division, and being laid to be an immemorial custom, it is disproved by evidence that the division was made within memory. *(b)*

(l) Keilw. 82 a, 84 b.

(m) Id. 167; Bro. Hariot, 2. 6, 7; Parker v. Gage, 1 Show. 81; Austin v. Bennet, 1 Salk. 356. *(n)* Bro. Hariot, 2. 6, 7.

(o) Major v. Brandwood, Cro. Car. 260.

(p) Dy. 199; Bendl. pl. 147; 2 Brownl. 90.

(q) Bro. Hariot, 11; Hod. 60.

(r) Bro. Hariot, 619; Kitch. 263. 267.

(s) Garland v. Jekyl, 2 Bing. 292.^a

(t) Lloyd v. Winton, 2 Wils. 28.

(u) Co. Ent. 613 a; Baldwin v. Noakes, 2 Lutw. 1309, 1310.

(x) Dy. 199 b.

(y) Parkin v. Redcliffe, 1 B. & P. 283.

(z) Griffin v. Blandford, Cowp. 62.

(a) Adderley v. Hart, 1 B. & P. 394, n. (a).

(b) Kingsmill v. Bull, 9 East, 185.

^aEng. Com. Law Repts. ix. 412.

IV. Wardship.

§ 817. In socage Tenure.

§ 817. Wardship was properly an incident to tenure by knight's service, and still is so to tenure in socage; but the lord cannot appoint a guardian of common right to an infant copyholder;(c) nor are copyholds within the 12 C. 2, c. 24, as to the appointment of guardians;(d) but, by custom, the custody shall be to the lord, as to the copyholds, for the prejudice that may otherwise be to the lord, and for the meanness of the estate;(d) and, by custom, the lord may assign one to take the profits of copyhold descended to an infant during his nonage, to the use of the assignee, without rendering *an account;(e) and where, by the custom of the manor, the [*638] bailiff of a manor is to have the wardship of the copyhold heir, being under the age of fourteen, such a guardian shall neither be admitted nor pay a fine, because he is but a farmer of the profits, and that not in his own right, but in right of him to whom he is guardian.(f)

V. Escheat.

§ 818. What is an Escheat.

§ 818. Escheat is a term altogether of feudal import, signifying a return of the land to the original grantor or lord of the fee; an escheat, therefore, is a fruit of seignory, which is vested in the lord by inheritance, except in cases of high treason, where all lands are forfeited to the Crown; so, where the tenant is guilty of felony only, that is, felony punishable with death,(g) the queen is entitled to the land for a year and a day, see further as to title by escheat, post, TITLE TO THINGS REAL.

III. Demise of Copyholds.

The grant of copyholds comprehends the following particulars:—

1. Who may grant copyholds.
2. How copyholds may be granted.
3. To whom grants of copyholds may be made.
4. Of what things grants may be made.
5. Construction of grants.
6. How the power of granting copyholds may be lost or suspended.

(c) 2 Lutw. 1190.

(d) Clench v. Cudmore, 3 Lev. 395; S. C., 2 Lutw. 118.

(e) 1 Leon. 266; Ca. 357.

(f) Co. Cop., s. 56, tr. 128.

(g) 2 Inst. 38.

*I. Who may grant Lands by Copy.

[*639]

§ 819. Grants may be made by Persons generally. By Bishops, &c. By the Queen Consort.	§ 822. When Grants are void. 833. Grants in other Cases. 824. Delegated Authority. Executors may make Grants. Grants by the Steward as by the Lord.
820. Grants by Lords having particular Estates.	825. Grants by the Queen's Steward.
821. Grants, when valid. Re-grant according to Custom.	826. Grants by Under-stewards, &c.
822. Grantor must be Lord.	

§ 819. Every lord of a manor having a lawful estate therein, whether in fee, in tail, for life, years, or at will, may make voluntary grants of such lands as come into his hands by escheat or otherwise, and such grants shall bind those who have the inheritance, *(h)* for these grants derive their force and effect, not from the lord, but from the custom of the manor; *(i)* if, therefore, a husband seised of a copyhold manor in right of his wife grant a copyhold, this shall bind the wife and her heirs, notwithstanding her coverture, for the copyholder is in by custom of the manor; *(k)* but the grant must be made in the name of the husband and wife; *(l)* so, a grant made by an infant is good, *(m)* or an idiot, or a lunatic, *(n)* for the law does not regard either the person of the lord, or the quantity of his estate; so, therefore, being an outlaw, or excommunicate, will not disable him to make voluntary grants, if, in the case of outlawry, between the awarding the exigent and the attainder; *(o)* so, a guardian in socage; *(p)* so, a grant made by a bishop, prebend, parson, is good, and in the case of a bishop will bind the queen on a vacancy of the see; *(q)* so, if the queen consort be tenant *for life of a manor, she may grant it by copy, and such grant by the custom of the manor shall bind the king himself, for she was [*640] *domina pro tempore*. *(r)*

820. So, as to the quantity of his estate, though the lord has only a particular interest in the manor, he may grant by copy, and though the estate granted by him may not only continue longer than his own estate in the manor, but even though the estate granted may not come into possession during the existence of his own estate, thus tenant in dower of a copyhold may grant in reversion, and it shall bind the heir after her death; *(s)* so, a guardian in socage may grant copyholds in reversion, and it shall bind the ward though it come not into possession during his infancy. *(t)* Whether a

(h) 4 Co. 23, b.; 1 Inst. 58, b.

(i) 4 Co. 24, a.

(l) Shoplane v. Roydler, Cra. Jac. 99; Co. Cop., s. 34, tr. 68.

(m) Co. Cop., s. 34.

(n) Co. Cop., s. 34, tr. 71.

(q) 4 Co. 22 a, 23, b.; Noy, 41.

(s) Gay v. Kay, Cro. El. 661; S. C., 1 Roll. Abr. 499; see also Godb. 135; Ow. 4.

(r) Shoplane v. Roydler, Cro. Jac. 55; see also Scopland v. Rydler, Godb. 143; Ow. 115; 1 Roll. Abr. 499.

(k) 4 Co. 23, b.; 8 Co. 63.

(n) Blewet's case, Ley, 47, 48.

(p) Osborne v. Carden, Plow. 293.

(r) 4 Co. 23, b.

lessee for years may grant copyholds in reversion, unless the reversion happen before his estate for years is ended, is not so settled;(*u*) but the better opinion appears to be that there ought to be a custom to enable the lord to grant copyholds in reversion;(*v*) so, on the same principle that the smallness of the lord's estate makes no difference, grants by tenant at will of a manor, and tenant by statute merchant, staple, or *elegit*, are good.(*x*)

821. But two things are necessary to the validity of such grants:—

First, that there being nothing but custom to warrant a grant by copy, such custom must be strictly pursued as to the estate, customs, services, and tenure, else it is not the estate demised before.(*y*) Therefore, although if there be a copyholder in fee, the lord may release part of the services without [*641] prejudicially affecting the copyholder's estate, as there appears in such case to be an old estate; yet, when the lord grants a new estate by copy, this being against common right, and warranted only by the custom, such custom to bind the heir must be strictly pursued,(*z*) consequently, a person having but a particular estate in the manor cannot grant a copyhold by parcels, or demise part and retain the residue himself.(*a*)

So, where lands have come into the hands of the lord by escheat or otherwise, the lord upon a re-grant of the same cannot diminish the ancient rent and services;(*b*) it seems, however, that he may reserve a greater rent;(*c*) but, as a rule, he cannot make the minutest variation in the grant, for that were to make a new copyhold;(*d*) and it seems doubtful whether a lord may re-grant copyholds in separate parcels at apportioned rents, unless where a copyhold of six acres, which has been ever demised for 6*s.* rent, has escheated to two coparceners, and one grants three acres, reserving 3*s. pro rata*, which is a perfect reservation;(*e*) see also Lord Mountjoy's case,(*f*) also 1 Watk. on Cop. 282; but, as to the apportionment of rent, and how far it operates as an extinguishment of the customary estate, see Reay v. Huntington.(*g*)

If lands grantable in fee escheat, the lord may grant them out again for life, this being warrantable by the custom, for the custom which enables him to grant in fee shall enable him to grant for life.(*h*)

Upon the same principle, if a copyhold comes to the lord's hands by [*642] escheat or otherwise, and the lord makes a lease for years or for life, or other estate by deed or without deed, this land can never after be re-granted by copy, for the custom is destroyed, because during such estates the land was not demisable by copy of court roll,(*i*) but see further on this point, post, § 839.

(*u*) Co. Cop., s. 34, tr. 74; Ow. 115.

(*v*) March, 6, pl. 13; Lord Oxford's case, Moor, 95; Plimpton v. Dobinet, Gouldsb. 36, 102; Godb. 140; 3 Leon. 226; Gilb. Ten. 322; 1 Watk. Cop. 40.

(*x*) 4 Co. 23; 1 Inst. 58.

(*y*) Bro. Tenant by Copy. 27; Co. Cop., s. 41.

(*z*) Bro. Tenant by Copy, 27; Co. Cop., s. 41.

(*a*) Gay v. Kay, Cro. El. 662.

(*b*) Kitch. 167, Co. Cop. s. 41, tr. 90 et seq.

(*c*) Ib.; see also Smith v. Renard, 2 Roll. Rep. 236.

(*d*) 2 Comm. 370; see also Co. Cop. sup.; Harris v. Jay, 4 Co. 30; Cro. El. 699; Clarke v. Pennyfather, 4 Co. 33; Paston v. Mann, Heil. 6.

(*e*) Co. Cop. s. 51, tr. 91.

(*f*) 5 Co. 3 b.

(*g*) 4 East, 271. 2*ER*.

(*h*) Kempe and Carter's case, 1 Leon. 56.

(*i*) French's case 4 Co. 31 a.

822. In the next place, the person making the grant must have a lawful interest in the manor at the time ; therefore, if any person having a tortious or defeasible estate of inheritance, subject to the action or entry of another, makes a voluntary grant upon escheat or forfeiture of a copyhold, such grant shall not bind him who has right, when he has recontinued the manor by action or entry ;(k) so, grants of copyholds by a tenant in tail after discontinuance, and by the feoffee of a man seised in right of his wife, may, after the death of the grantor, be avoided by the heir ;(l) so, grants made by the heir after the death of the ancestor, whereof the widow is endowed ;(m) so, grants made by an abator or intruder ;(n) so, by a tenant at sufferance, (o) as by a grantee *pur autre vie*, continuing after the death of *cestui que vie*, or by a lessee for years of a manor after a breach of condition annexed to his estate, and before entry of lessor ;(p) *sed secus* upon grants made by a lessee for life on condition, after the condition broken, but previous to entry for breach of condition, as the livery of seisin necessary to perfect the grant could only be avoided by entry or claim ;(q) so, grants by the feoffee of an infant cannot be avoided by the entry of the infant.(r)

So, grants made after an alienation in mortmain will be *void, even before the lord paramount has entered for a forfeiture ;(s) so, [*643] by a parson, (a manor being parcel of his glebe,) made after institution, and before induction, for as to the temporalities he is not complete parson before, though it is otherwise as to the spiritualities.(s)

823. It is said, that if there be two joint-tenants of a manor, and a copyhold escheats, one of them may grant the entirety of this copyhold, each being seised *per mie et per tout*.(t)

If the estate of the grantor cease the next moment, it is immaterial, if he be lord at the time ; therefore, if a man seised of a manor in fee hath issue a daughter and die, his wife *privement enseint* with a son, the daughter may grant by copy, for she was *legitima domina pro tempore* ; so, if the lord commit felony, and be attainted or convicted by verdict or confession, yet grants made by him after the felony committed, and exigent awarded, will be good, though by relation the manor is in such case forfeited from the time of the exigent, for in all these cases he is *dominus pro tempore*.(u)

824. A person having an authority derived from one who is lord *pro tempore*, or otherwise, may make grants of copyholds ; therefore, if the lord of a manor, seised in fee simple, by his will direct that his executors shall grant copyhold estates according to the custom of the manor, for the pay-

(k) 4 Co. 21 a ; see also 1 Kitch. 197 ; Co. Cop. s. 34, tr. 72 ; 1 Inst. 58 ; Dillon v. Fraine, Poph. 71.

(l) Chudleigh's case, 1 Co. 140 b ; Co. Cop., s. 34, tr. 73, 74.

(m) Co. Cop. § 34, tr. 71 ; 1 Inst. 58, b.

(n) 1 Inst. 58, b.

(o) Rous and Artois' case, 2 Leon. 45 ; S. C., Ow. 28 ; S. C. nom. Rous v. Artois, Moor, 236 ; S. C., cited 4 Co. 24 a ; Co. Cop., § 34, tr. 74.

(p) Co. Cop., § 34, tr. 74.

(q) Earl of Arundel's case, Dy. 342 ; S. C., Jenk. Cant. 242, Ca. 26 ; S. C. Bendl. & Dal. 290 ; S. C., recognised 4 Co. 24 a ; Co. Cop., s. 34, tr. 70, 74, 75.

(r) Co. Cop., s. 34.

(s) Co. Cop., s. 34.

(t) Co. Cop., s. 34, tr. 76 ; but see contra, Lancaster v. Lucas, 1 Leon. 234 ; 2 Com. 183 ; 1 Watk. on Cop. 26.

(u) Co. Cop., s. 34, tr. 70, 71 ; see also 1 Watk. on Cop. 27 et seq.

ment of his debts, &c., and they make voluntary grants accordingly, these grants are good, although they have no interest whatever in the manor.(x)

Grants made as well by a steward as by the lord are good, and it should seem, that if he is a steward *de facto* only, it will be sufficient, for the law [*644] is little inclined to examine either *the imperfections of the steward's person as being an idiot, &c., or the unlawfulness of his authority;(y) yet, even a steward *de jure* cannot grant copyholds in opposition to the express commands of his principal;(z) neither would a grant by diminishing the ancient rents and services be good, for he is in the place of the lord;(a) and although the lord afterwards become lunatic, yet he may by his steward grant copyholds;(b) but although in that case it was ordered that the steward should not grant without the privity of the committee, yet it would seem that the steward's grants are sufficient.(b)

825. The queen's steward is appointed by letters-patent, and such a steward *ex officio*, without any special warrant, may grant copyholds, and the queen shall be bound by the custom of the manor;(c) yet his duty is before he makes any grant to inform the Lord Treasurer, or the Chancellor, or Barons of the Exchequer;(c) but a steward retained only by the queen's auditor or receiver cannot make such voluntary grants, for neither the auditor nor receiver has authority to appoint stewards;(c) but if A. and B., under the seal of the Exchequer, be appointed joint stewards of all the lands of a fugitive, and A. make a court and grants copies, though in strictness he had no power without B., yet these grants are good, being made by one that had a colour to keep courts.(d)

826. So, may an under-steward or deputy grant by copy;(d) and even such deputy may appoint another to make grants for him;(e) except in the case of the queen, whose steward cannot appoint a deputy, without an [*645] express authority for *that purpose;(g) but the bailiff of a manor cannot make grants by copy, such power being foreign to the general nature and duties of his office.(h)

(x) 1 Inst. 58, b.; Co. Cop., s. 31, tr. 72, 73.

(y) Co. Cop., s. 45, tr. 194, 195; Gilb. Ten. 316.

(z) Harris v. Jay, 4 Co. 30; S. C. nom. Harris v. Jays, 4 Cro. El. 699.

(a) Harris v. Jays, sup.; see also Moor, 112; Gilb. Ten. 222.

(b) Blewit's case, Ley, 47, 48.

(c) Harris v. Jay, sup.

(d) Knowles v. Luce, Moor, 109.

(e) Parker v. Kett, 1 Ld. Raym. 658; S. C., 1 Salk. 95.

(g) Harris v. Jay, 4 Co. 30.

(h) Gilb. Ten. 204.

II. *How Copyholds may be granted.*

- § 827. Where the Lord may or may not in- | § 828. As to granting Copyholds out of
crease the Rent and Services. | the Manor.
§ 828. Entry of the Grants on the Rolls.

§ 827. If a lord grants a copyhold upon a surrender, he ought to grant it, according to the intent of the surrender, and he cannot increase the rent and services; *(i)* but where a copyhold comes to the lord by escheat, forfeiture, &c., he may grant it *de novo*, rendering a greater rent, see ante, § 821; also for what estates copyholds may be granted, see post, CUSTOMARY ESTATES.

828. It has been much discussed whether the lord of a manor can grant copyholds out of the manor, or indeed out of court; but the better opinion appears to be that as these grants may be made by the lord or his steward, they may be made as well out of court as in; *(k)* and the lord may make a grant out of the manor at what place he pleases; *(l)* but not an under-steward without express authority; *(m)* but if the court itself is void, all grants and admittances, though made by the lord himself, will be void too; *(n)* so, where one had two manors, and granted a copyhold of the one manor at the court of the other, held, that it was a void grant, for *it cannot be copyhold according to the custom of the manor, where- of it is not parcel. *(o)* [*646]

So, to establish the validity of all such grants, it is necessary that an entry thereof should be made on the rolls of the manor, for it is said, "If the lord in open court doth grant a copyhold land, and the steward maketh no entry thereof in the court-rolls, this is not good, though it be never so publicly done, nor no collateral proof can make it good." *(p)*

III. *To whom Grants of Copyholds may be made.*

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| <p>§ 829. Grants may be made to Persons gene- rally.
Exception as to Lord.
830. A Feme covert may be a Grantee, when.</p> | <p>§ 831. The Queen cannot be a Grantee. Whether a Corporation may be a Grantee.
832. Whether an Alien may.</p> |
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§ 829. As a rule, all persons capable of taking grants at common law may take also by copy, and *vice versâ*; *(q)* but to this rule there are some

(i) 2 Roll. Abr. 236.

(k) 1 Inst. 61, b.

(l) Melwiche's case, 4 Co. 26 b.

(m) Co. Cop. s. 46; see also Gilb. Ten. by Watkins, n. *(n)*; 1 Watk. Cop. 39.

(n) Clifton v. Molineux, 4 Co. 27.

(o) Duke of Suffolk's case, cited in Sands v. Drury, Cro. El. 814; see also Marke v. Sulyard, Toth. 107; and see further 1 Scriv. Cop. 126, 3d ed.

(p) Calth. Read. 37.

(q) Co. Cop., s. 35, tr. 79; Calth. Read. 51 et seq.

exceptions arising partly from the nature of the copyhold tenure; thus, the lord cannot grant a copyhold to the use of himself, for *nemo potest esse tenens et dominus*; (r) and when, says Lord Coke, the lord may take a copyhold to his own use, that must be understood to mean that he may take a surrender to his use. (s)

830. A *feme covert* may be the purchaser of a copyhold, and the purchase shall stand in force until her husband disagrees; (t) but a *feme covert* cannot be a grantee of a copyhold immediately from her husband. (u)

[*647] *831. The queen cannot be a copyholder either in her corporate or natural capacity; therefore, if a person who holds a copyhold estate becomes a king, the copyhold is suspended, for it would be beneath the dignity of a king to perform services. (x)

It is generally supposed by text writers that a corporation either aggregate or sole cannot hold by copy of court-roll, for the effect would be to deprive the lord as well of suit and service as of his fine; (y) but my Lord Coke is the other way; (z) and in *Ranshaw v. Robotham*, (a) it was held, that, supposing a surrender to be made to A. to the use of a charity, it is clear that the lord would be compellable to admit A., because he would receive no prejudice thereby, as he would have his tenant in A.

832. Whether an alien may be a copyholder is not so settled. It has been said that a bond-man and an alien born may be a copyholder, and neither the queen nor the lord can seize the same; (b) but the better opinion seems to be that an alien could not compel the lord to admit him, (c) and that the lord, not the queen, should have the advantage of any purchase of copyholds made by an alien, (d) in which case it was held, that copyholders being idiots were not within the Survey of the Court of Wards, but of the manor courts only; and in *R. v. Holland* (e) it is said to have been adjudged that, if an alien purchase copyhold lands, the king shall not have the estate but as a trust, and the particular reason was, because the king shall not be tenant to the lord of the manor. (f)

(r) *Calth. Read*, 53.

(s) *Co. Cop.*, s. 35; see also 1 *Watk. Cop.* 30.

(t) *Co. Cop.*, s. 35, tr. 79; *Shepp. Ct. Keep.* 115.

(u) *Symes v. Pennant*, 2 *Wils.* 254.

(x) *Field v. Boothsby*, 2 *Sid.* 82; see *R. v. Holland*, *Sty.* 41; recognized in *Duke of York v. Marsham*, *Hard.* 434.

(y) See 1 *Ca. and Opin.* 186; 1 *Watk. on Cop.* 242, n.

(z) *Co. Cop.*, s. 49, tr. 113, 114.

(a) *Duke Char. Us. by Bridgman*, 135.

(b) *Calth. Read*, 52.

(c) *Harrison*, *Lect. Linc. Inn*, 1632, cited 1 *Seriv.* 133, n. (c); 1 *Watk. Cop.* 31.

(d) *Dy.* 302.

(e) *Sty.* 41.

(f) *Smith v. Wheeler*, 1 *Mod.* 17, citing *R. v. Holland*, *sup.*

*IV. What Things grantable by Copy of Court-Roll.

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| <p>§ 833. What Things generally are grantable.
Land, or Things that concern Land.
834. Right Parcel of the Manor, and of Perpetuity.
836. Whether Tithes are grantable.</p> | <p>§ 834. Underwood, Trees, &c.
The Fore Crop or <i>Prima Tonsura</i>.
835. Incorporeal Things not grantable. Unless Appendant.
When in gross not grantable.</p> |
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§ 833. Generally, all lands and tenements situated within, and being parcel of a manor, are grantable by copy, (*g*) and so even a manor itself may be demisable by copy; (*h*) and the lord of the customary manor may hold customary courts, but not a court-baron. (*i*)

So, anything that concerns lands or tenements may be granted, therefore, it has been adjudged that a mill may be granted by copy. (*k*)

834. Again, what things soever are parcel of the manor and are of perpetuity may be granted by copy, otherwise it can never be shewn that there has been a custom to demise them by copy; (*l*) therefore, underwood, even without the soil, may be demised by copy, because it is a thing of perpetuity, to which the custom may extend, (*m*) and for the same reason a grant by copy of twenty loads of wood to be taken by the grantee is good, for it is not necessary that the thing have continuance, but only that it be a thing of *perpetuity, which trees are; for a man may have an inheritance in trees, and trees whilst growing are a tenement, and a [*649] tenure may be reserved upon a grant of them; (*n*) so, also, the herbage or vesture of land, the fore crop, or *prima tonsura* may also be grantable by copy, (*o*) and the freehold interest in the soil may be in one man, and the copyhold interests of the *prima tonsura* may be in another; (*p*) but the grant by copy of wastes, which have not usually been so granted, will not be good, because, in order to support a grant by copy, it is essential that the thing granted has been demised and demisable from time immemorial. (*q*)

835. Things which do not lie in tenure are not grantable by copy, and therefore things incorporeal, for which there can be no distress, and which are not parcel of the manor (this consisting only in demesnes and services) cannot be demisable by copy, for no service can be reserved or due upon the grant of incorporeal things; and as no attendance is due from the

(*g*) 1 Inst. 58, b.

(*h*) R v. Stanton, Cro. Jac. 259; S. C. nom. R. v. Staverton, Yelv. 190.

(*i*) Moore v. Woodgame, Cro. Jac. 327; S. C. nom. Nevil's case, 11 Co. 17 a; see also Jenk. Cent. 274, pl. 95; Scroggs, 94; 1 Watk. Cop. 32 et seq.; 1 Scriv. Cop. 126, 3d ed.

(*k*) Ward's case, 4 Leon. 241, citing and recognizing Green and Harris, where the same was adjudged.

(*l*) Co. Cop. s. 42, tr. 97; Gilb. Ten. 332.

(*m*) Hoe and Taylor, 4 Co. 30 b, 31 a; S. C., 1 Cro. El. 413; S. C., Moor, 315, adjudged and affirmed upon a writ of error.

(*n*) Co. Cop. s. 42, tr. 98; Gilb. Ten. 332.

(*o*) Hoe v. Taylor, 4 Co. 30 b, 31 a; Sands and Drury, Cro. El. 814.

(*p*) Stammers v. Dixon, 7 East, 200.

(*q*) Newman v. Newman, 2 Wils. 125; 1 Watk. Cop. 34, and cases there cited.

grantee, no court is necessary to be kept for surrenders, admittance, &c. (r) But a distinction has been taken between things appendant and things in gross, for things incorporeal, which are appendant to those that lie in tenure, may be granted, as a common appendant to land which is parcel of a manor, may be granted by copy without the land; (s) and so common of pasture and other commons are grantable by themselves without the land; (t) so, a rent-charge and rent-seck may be parcel of a manor, and, consequently, demisable; (x) and also rent-service; (y) so, an advowson, fair, market, piscary, [*650] being appendant to a manor, *may, for the same reason, be granted by copy. (z) On the other hand, advowsons, rents, commons, and the like, when in gross, and consequently, not parcel of the manor, cannot be held by any sort of service, and therefore are not grantable by copy. (a)

836. It has been much doubted whether tithes were demisable. In Sir John Bourne's case (b) and in *Hoe v. Taylor*, (c) it was adjudged that tithes were demisable; but in *Sands v. Drury* (d) this was denied to be law, and it was there held, that tithes cannot pass unless by deed, and, therefore, to grant them by copy of court roll cannot be good, and it was also said, it had been adjudged that tithes cannot be parcel of a manor; but in *Musgrave v. Cave* (e) this last decision was overruled, and it was held that tithes, like other incorporeal hereditaments, may be parcel of a manor, and, consequently, demisable by copy, if the custom will warrant it.

V. Construction of Grants.

§ 837. General Construction of Grants.
Subject to the Custom of the
Manor.

§ 838. Construction of particular Words or
Forms of Grants.
The Word "successive."

838. What Parties may take.

§ 837. As a rule grants of copyholds receives the same construction as grants of freehold land do at common law, therefore a grant to one and his heirs gives a fee simple; (f) so, grant of a copyhold to A. and his heirs, upon condition that he pay 100*l.*, and if he fail, then to B. and his heirs, has [*651] been held to be good, the Court considering it not so much a *fee dependent upon a fee, as a use limited upon a feoffment; (g) but such grants will be construed, for the most part, as they are in pursuance of the custom or otherwise, therefore, if copyhold lands have been usually granted in fee, a grant to one and the heirs of his body, or to one for life

(r) Co. Cop., s. 42, tr. 97; Calth. Read, 41; Gilb. Ten. 332.

(s) Sands v. Drury, Cro. El. 814.

(t) Musgrave v. Cave, Willes, 319.

(x) 2 Roll. Abr. 120, pl. 2, 3.

(y) Id., pl. 4, citing 22 Ass. 53; 31 Ass. 23; see also Musgrave v. Cave, Willes, 325.

(z) Ib.; and see *Hoe v. Taylor*, 4 Co. 30 b, 31 a; Sands v. Drury, Cro. El. 814.

(a) Co. Cop., s. 42, tr. 97; Calth. Read, 41; Gilb. Ten. 331.

(b) Cited 1 Roll. Abr. 498 a, pl. 1.

(c) 1 Cro. El. 413.

(d) Sup.

(e) Willes, 324.

(f) Litt., sect. 73.

(g) Paulter v. Cornhill, 1 Cro. El. 361.

or years, is within the custom, for the lord having an authority by custom, and also an interest, the custom which enables him to grant a greater estate will enable him to grant a less, *quia omne majus continet in se minus* ;(h) so, after the death of tenant for life, the lord may grant the same again in fee, for the grant for life was not any interruption of the custom.(i) So, where grants have been made for life, a grant *durante viduitate* is good, for that is a less estate than during her life ;(k) so, if there be a custom that copyholds may be granted for three lives, a copyhold may be granted to three for the lives of two within the custom, for there is no inconvenience to the lord, though it be for the life of another, for there shall not be any occupancy, but the lord shall have it, if the tenant *pur autre vie* die living *cestui que vies*, and this is not a greater estate than for three lives, which is what the custom warrants ;(l) so, if the lord grant by copy, to hold for the lives of two, and the longest liver of them successively, it will not give any estate to the *cestui que vies*, (m) unless there be a special custom in favour of such construction, as in the case of *Nepean v. Goddard*, (n) where there was a custom which gave the copyholds to the *cestui que vies*, in the event of the grantee dying without having disposed of the estate by will, and therefore extending the principle of general occupancy to copyholds was held to be good.

*838. The words *sibi et suis*, or *sibi et assignatis*, and such like, [*652] may, by custom, create an estate of inheritance ;(o) and so, by custom, the words "him" and "his" may create an estate for life only ;(p) so, a grant by the lord to the father and son, there being but one son, is good, but if more than one son, it is void for uncertainty.(q)

If a copyhold be granted to three *habendam successivè*, they are joint-tenants, unless by special custom the word *successivè* makes the estate several ;(r) so, if the custom of the manor be, that the lands are demisable by copy to two or three for their lives, and the life of the survivor, *habendum successivè sicut nominantur in charta et non aliter*, paying a heriot on the death of every one dying seised, a grant to A. and his assigns, for the lives of B. and C., and of the said A., is good within the custom ;(s) but if by the custom of the manor a copyhold may be granted for three lives, and it is granted to one for his life with remainder to such woman as he should marry, remainder to the first son of his body, such remainder shall be void and the estate for life only is good.(t)

In the grants of copyholds the party named in the *habendum* only may take, for in many manors it is customary to insert the words of grant and

(h) 1 Inst. 52; see also Godb. 20; *Stanton v. Barnes*, 1 Cro. El. 373; *Kempe and Carter's case*, 1 Leon. 56.

(i) *Kempe and Carter's case*, sup.

(k) *Down v. Hopkins*, 4 Co. 20 b, 30 a; S. C., 1 Cr. El. 323.

(l) 1 Roll. Abr. 511.

(m) *Wells (Dean, &c.) v. Bawden*, 3 East, 260.

(n) 1 B. & C. 522; S. C., 2 D. & R. 773.

(o) *Bunting v. Lepingwel*, 4 Co. 29 b.

(p) *Hide v. Welsh*, Sel. Chan. Ca. 165; see 1 Watk. Cop. 109, n.; 1 Scriv. Cop. 122.

(q) *Cob v. Betterson*, Cro. Jac. 374.

(r) 2 Co. Cop., s. 142.

(s) *Smartle v. Penhallow*, 1 Salk. 188; S. C., 1 Ld. Raym. 434; S. C., 6 Mod. 63.

(t) *Moor*, 677, pl. 922.

^aEng. Com. Law Repts. viii. 148.

limitation in the *habendum* only, and there are forms of such grants that have been held good.^(u)

[*653] *VI. *How the Power of granting Copyholds may be lost or suspended.*

§ 839. Power of granting Copyholds lost by	§ 842. Power of Re-grant.
Change of the Estate.	By Alienee.
When suspended.	By Copyholder.
840. Lords having particular Estates.	By Lessee.
841. In the case of the Crown.	843. Effect of Re-grant.
844. Re-grant of Copyholds under the Statute.	

§ 839. Although lords of manors having copyholds coming to them by escheat, forfeiture, &c. may re-grant them according to the custom of the manor, yet this power may be lost in different ways, as by changing the nature of the estate and creating a common-law interest, therefore, if the lord makes a lease for years or for life, or other estate by deed or without deed, the copyhold is destroyed ;(*x*) so, if the lord makes a feoffment in fee upon condition, and afterwards enter for the condition broken, yet it cannot be granted again by copy ;(*x*) or, if the land so forfeited or escheated, before any new grant made, be extended upon a statute or recognizance ;(*x*) so, if the wife of the lord, in a writ of dower have it assigned to her.^(x)

But a distinction has been taken between interruptions which are by act of law, and such as are by tortious acts, for in the former case, as in the instances above given, the interruptions being all by lawful acts, the demisable quality of the land is destroyed : but in the latter case, where the act is unlawful, and therefore void, the demisable property is not destroyed, only suspended ; therefore, if the lord be disseised, and the disseisor die seised, or if the land be recovered by the lord by a false verdict or erroneous judgment, though it be not demisable by copy until it be recovered by the rightful lord, yet, after it is come again into his possession it is grantable again by copy.^(x)

[*654] *840. Again, the power is totally lost only when the lease or grant is so made by a lord who is seized in fee, for if the lord has only a particular interest in the manor, as being a tenant in tail or for life, or husband seized in right of his wife, and the like, he shall not, by making such a lease or grant, prejudice the estate of him who is entitled in remainder or reversion ; and therefore, though he himself shall be bound by his own act, and precluded from granting the lands again by copy during his own time, yet, upon the determination of his estate, the land will resume its demisable quality, for the custom cannot be affected to any greater extent than the estate which the person committing the act had in the land ;(*y*) so, a feoff-

(*u*) *Brooks v. Brooks*, Cro. Jac. 434. citing 4 Ed. 3, pl. 11 ; see also S. C., Poph. 125 ; *Cosh v. Lovcless*, 2 B. & A. 454 ; *Gilb. Ten.* 255.

(*x*) *French's case*, 4 Co. 31 a.

(*y*) *French's case*, 4 Co. 31 a. ; *Connesbie v. Rusky*, 2 Cro. El. 459 ; S. C., nom. *Rusley and Conesby*, 2 Roll. Abr. 271 ; *Prior of Bath's case*, 4 Leon. 199.

ment in fee upon condition is said not to destroy the power, although the lord afterwards enter for the condition broken ;(z) so in *Lee v. Boothby*,(a) it was held, that if the lord leased the manor, and also a copyhold, by name, it was no extinguishment of the copyhold, and the naming the copyhold was surplusage ; but if he leased a copyhold by itself, it was gone as a copyhold forever ; it was also said there, that if a lord, though but *dominus pro tempore*, made a lease for years of a copyhold by itself, it would destroy the copyhold ; but this is at variance with French's case, &c.,(b) 'also with *Winter v. Loveday*,(c) where it was held, that if a lessee of a manor makes leases of the copyholds, it will not be an extinguishment of them, yet if a lessee by virtue of a power demises, that is an absolute destruction of them, because the power is derived out of the fee, and it is all one as though tenant in fee simple made a lease.(d)

*841. In *Cromer v. Burnett*,(e) it was held, that if the king leased an escheated copyhold by deed, the custom shall not be [*655] destroyed ; but, on the expiration of the lease, he might again grant it by copy, for the grant of the king shall not enure to a double intent as that of a subject may ; see also 1 Inst. 58, b., and n. (7) ; Prior of Bath's case ;(g) but see contra, *Lee v. Boothby*.(h)

842. But if lands come into the hands of the lord by escheat, forfeiture, or otherwise, he may keep the lands in his own hands, or he may re-grant them at pleasure ;(i) and if the lord alien the manor, his alienee may re-grant the land by copy ;(k) so, if a copyholder accede to the manor by taking a lease thereof for years and the like, by which his copyhold is extinct, yet he may re-grant it just as the original lord might have done on an escheat, and it matters not whether the manor come to the copyholder or the copyhold to the lord, for it was always demised or demisable.(l)

843. As on the grant of a copyhold, the tenant is in immediately, not by the lord, (who acts only as an instrument,) but by the custom, which being prior to and paramount the interest of the granting lord, it follows, that on a re-grant of the copyhold, the grantee cannot be affected by any acts done by the lord whilst the lands remained in his hands, which in the case of freehold lands, might operate as a charge or incumbrance on the land ; therefore if, after the escheat of a copyhold, the lord grant a rent-charge or acknowledge a statute, and then re-grant the land to be holden by copy, such rent-charge or statute will be no charge upon the copyhold ;(m) and, in like case,

(z) Co. Cop., s. 62, tr. 141.

(a) W. Jo. 449.

(b) Sup.

(c) 1 Freem. 507 ; S. C., 1 Com. 40 ; S. C., Carth. 427 ; S. C., 1 Ld. Raym. 267 ; S. C., 5 Mod. 244 ; 12 Mod. 147, (but as to 12 Mod. sec 1 Dougl. 83.) S. C., 2 Salk. 537.

(d) 1 Freem. 508, et supra.

(e) Str. 266.

(g) 4 Leon. 199.

(h) W. Jo. 449.

(i) Co. Cop., s. 62, tr. 141 ; French's case, 4 Co. 31 b ; Taverner and Cromwell, 3 Leon. 108 ; Blemmerhasset v. Humberstone, Hutt. 65 ; S. C. nom. Blenerhasset v. Humberstone, W. Jo. 48 ; Gibbons v. Pott, 2 Dougl. 720.

(k) French's case, sup.

(l) 4 Co. 31 b.

(m) Swayne's case, 8 Co. 63 b ; S. C., Moor, 811 ; 4 Co. 24 a ; Co. Cop., s. 34, tr. 71 ; Podger's case, 9 Co. 107 ; Cham and Dover's case, 1 Leon. 16.

[*656] *it has been decided, that the grantee will hold discharged of the dower of the wife of the lord,⁽ⁿ⁾ but see contra as to a rent, Walton's case,^(o) Sands v. Hempston, &c. ;^(p) and in Sammer and Force^(q) it is said, if a copyholder be of twenty acres, and the lord grants rent out of those twenty acres in the tenure and occupation of the said copyholder, (and names him,) then if this copyhold escheat and be granted again, the copyholder shall hold it charged, for this is now charged by express words.

Upon the same principle, if the lord grant the freehold of the lands of his copyholder to a stranger,^(r) or lease them for years to a stranger,^(s) this will extinguish or determine the copyhold estate, for custom has so established the copyholder's estate, he is not removable at the lord's will so long as he performs his customs and services.^(t)

844. By the 35 H. 8, c. 13, it is provided, that the king's manors of Granges, &c. in the county of Norfolk, formerly part of the possessions of the abbey or priory of Walsingham, might be granted by copy of court roll, in fee simple, or term of life or lives, by the stewards of the said manors, for such rents, services, fines, heriots, and customs as in the said copies should be good against the king, his heirs, successors, and assigns; and by the 37 H. 8, c. 2, it is provided, that so much of Hounslow Heath as was the king's inheritance, and was meet for tillage, pasture, meadow, or other several ground, should be of the nature of copyhold land, or the same might be letten by the steward of the manor at will, or for twenty-one years, which lessee, &c. might improve it.

[*657] *IV. Rights and Interests of Lord and Tenant.

§ 845. Manorial Rights.

846. Estate of the Lord in the Lands granted to the Tenants.

The Freehold is in the Lord.

847. Customary Estates.

848. Tenant's Interest in the Rolls of the Court.

849. Possessory Right is in the Tenant. Tenant's Interest in the Underwoods, &c.

850. Extent of the Right. Tenant's Interest in the Shade, &c. of the Trees.

851. Tenant has no Right to sell Wood, when.

852. Lord's Right to the Trees when severed from the Soil.

853. Tenant's possessory Right in the Mines.

854. Tenant's Remedy against the Lord in case of his entering on the Land.

Bourne v. Taylor.

§ 854. Grey v. Northumberland (Duke).

855. Extent of Tenant's possessory Right to the Surface and what is underneath.

856. Lord's Right to the Minerals when severed.

857. How the Lord may lose his Right to the Minerals.

858. Prima facie Right of the Lord to the Wastes and Commons.

How restricted.

859. Extent of the Right.

860. Copyholders may claim Right of Common by Custom only.

When the Custom is good, or otherwise.

861. Right of Lord to appoint a Guardian, &c.

Lord's Power over the Lands of Lunatics.

862. Where Lands are purchased by Aliens.

(n) Sands and Hempston, 2 Leon. 109; S. C. nom. Executors of Sir Wm. Cordel, Id. 252; S. C. nom. Earl of Westmorland's case, 3 Leon. 59; Sneyd v. Sneyd, 1 Atk. 442.

(o) 3 Dy. 170 b.

(p) 2 Leon. 109.

(q) 2 Brownl. 208.

(r) Murrel v. Smith, 4 Co. 24 b.

(s) Lane's case, 2 Co. 16; Beale and Langley, 2 Leon. 209; 4 Leon. 230.

(t) Lane's case, sup.

§ 845. The rights of the lord are properly denominated manorial, as they are enjoyed in respect of that privileged district of land in his possession, known by the name of a manor, see ante, §§ 88 et seq., and are either incident to the manor, or are usually, though not necessarily and exclusively, annexed to the same. Of the first description are the fruits or appendages of tenure, as fealty, services, fines, &c., see ante, §§ 770 et seq.; right to have a court-baron as incident to a manor, see ante, § 631; and a power to grant lands by copy of court-roll, see ante, §§ 819 et seq. Those of the second description are the franchises already treated of, see ante, §§ 623 et seq., which, though usually annexed to manors, do not necessarily and exclusively belong to or go with them.

*846. As to the estate which the lord has in those portions of the manor which have been granted to his tenants, this is very different. [*658] A tenant by copy of court-roll is still described as a tenant at will, although he may possess an estate in fee simple, in fee tail, for life, by the curtesy, and other estates similar to those which may be had in freehold lands at common law; and the freehold, on the other hand, is considered to reside in the lord only, and to many intents it continues so to do, particularly as regards the lord's right of escheat and forfeiture, but the tenant does not hold at the arbitrary will of the lord, for he holds also according to the custom of the manor, and a tenant is not removable at the lord's will, so long as he performs his customs and services. (u)

847. Custom directs every thing relating to the estates of the copyholder, as it does in respect to copyholds generally; and as customs vary not only from the common law but also from each other in different manors, the incidents of copyhold estates differ from similar estates at common law in many particulars, which will be treated of under the head of CUSTOMARY ESTATES, see post; and as to the modes of transferring such interests under title by customary alienation, see post, TITLE TO THINGS REAL.

848. Tenant by copy of court-roll has an interest in the rolls of the court as well as the lord, and the lord cannot deny copyholders access to them; (x) and the steward has been ordered, on several occasions, to produce the rolls. (y)

But besides the rights and interests already mentioned, there are three things in which the lord and tenant have an interest in common, though in different degrees, namely, in trees, mines, and commons, which demand here a particular *consideration, although treated of in other parts, [*659] see post, under CUSTOMARY ESTATES.

1. *Rights in Trees.*

849. A copyholder has the same customary or possessory interest in the trees as he has in the land, (z) for custom has fixed it to his estate against

(u) Lane's case, 2 Co. 16.

(x) Widow Stacy's case, Latch, 182.

(y) Corbett v. Pesthall, Toth. 109; Anon., Sty. 128; Dowdswell v. Dowdswell, Chan. Ca. 261; Anon., 11 Mod. 111.

(z) Ashmond v. Ranger, 12 Mod. 379; S. C. nom. Ashmead v. Ranger, 1 Ld. Raym. 552; S. C., 2 Salk. 638; 1 Com. Rep. 71; S. C., Holt, 162; S. C., Fort. 152.

the lord, for the copyholder has as great an interest in the timber trees as he has in the messuage which he holdeth by copy; (a) but a copyholder may not cut down trees, or do any other injury to the freehold, without the lord's license; therefore, a custom that a copyholder for life may cut down and sell timber trees at pleasure is void; (b) although, by special custom, a copyholder of inheritance may cut down trees, for he has a *quasi* inheritance in the copyholds, and so he hath in the trees, (c) yet, without a special custom, no copyholder can commit waste; (d) so, in the absence of custom, it has been held, that a copyholder cannot cut down trees. (e)

850. It is however a good custom that copyholders in fee shall have the loppings of pollingers, and the lord cannot cut them down, for that would deprive the copyholder of the future loppings; (f) and a copyholder may maintain trespass against the lord, *quare clausum fregit et arborem suam*, &c. *succidit*, because of the interest which the copyholder has in the trees, see *supra*, § 849; so, it was the unanimous decision of the Court, in *Ashmond*, or *Ashmead v. Ranger*, (g) *that trespass would lie by the [*660] copyholder for life against the lord, for cutting trees on the estate, and not leaving sufficient for repairs, the custom being that every copyholder for life shall have timber trees, &c., for the reparation of the premises; and this decision was affirmed in error in the Exchequer Chamber, but both the judgments were reversed in Dom. Proc., ten Lords being for the affirming, and eleven for the reversal, and it was there said, the tenant could not cut the trees, and if the lord could not, then no body could, and they must rot on the land; as to the tenant's right to estovers, see *post*, § 851.

The tenant's interest in the trees is not confined to the use of them for repairs, &c., or domestic purposes, for he has an interest in the fruit and shade, &c.; (h) and so, if birds build nests in the trees, the eggs are the tenant's, and this, it is said, shews that he has a possessory interest in the trees, though his estate be but for years. (i)

The tenant has also such an interest in the trees that he may maintain an action on the case against a stranger for cutting down trees, and so may the lord for the same trespass done to the inheritance. (k)

851. When the custom is to have wood for repairs or other necessary uses, the right to sell any part of it will not be supported by any thing but the clearest evidence of usage; therefore where the tenants covenanted with the lord that they would not cut down, sell, or dispose of any wood without the license of the lord, held, in an action against a tenant for cutting down and selling wood, that evidence, that the tenants of defendant's estate had, for thirty years and upwards, publicly, and without interruption from the

(a) *Heydon and Smith's case*, 13 Co. 69; see *infra*, § 850.

(b) *Rockey v. Huggens*, Cro. Car. 220; S. C. nom. *Rockey v. Huggins*, W. Jo. 245; S. C. nom. *Rooke and Huggens*, 1 Roll. Abr. 560; S. P., *Powel v. Peacock*, Cro. Jac. 30.

(c) *Rockey v. Huggens*, *sup.*; see also S. P., *Glascok v. Pêche*, 4 Leon. 238; S. C., Roll. Abr. 560; S. C., cited 2 D'Anv. 426.

(d) *Ashmond v. Ranger*, *sup.*

(e) *East v. Harding*, Cro. El. 498.

(f) *Stebbing v. Gosnal*, Cro. El. 629; S. C., 1 Roll. Abr. 108, 376.

(g) *Sup.*, § 849.

(h) 2 H. 4, pl. 12.

(i) *Ashmond v. Ranger*, 12 Mod. 379.

(k) Co. Cop., s. 51, tr. 119; 3 Lev. 231.

lord, and with his knowledge, cut and sold the planted wood on the estate, in large quantities, was admissible, but not *evidence of reputation that the tenants had the right of so doing; (*l*) and it is a question for [*661] the jury to decide whether trees were cut down for the purpose of repairing the premises *bonâ fide*, and were in a course of application for that purpose, or whether there were evidence that they were to be applied to any other purpose. (*m*)

852. Although the tenant has a possessory property in the trees, yet when the possession is gone the property is gone; (*n*) but as to pollards, dotards, bushes, &c., the law is otherwise, and if thrown down they belong to the tenant, Countess of Cumberland's case; (*o*) Herlakenden's case, (*p*) which were cases relating to lessees at common law; see also *Berry v. Heard*, (*q*) *Gordon v. Harper*, (*r*) *Berriman v. Peacock*; (*s*) see also further, under Estates for Life, &c.

2. Rights in Mines.

853. In the absence of any special custom, the copyhold tenant has a possessory interest in the mines, and, by custom, he may have not only a right of possession, but also a right of property in the same. The lord, on the other hand, has the right of property, but, without a special custom, he has no right to enter upon the lands of the copyhold tenants to search for and obtain the minerals, unless he has previously had their consent, and thus it is laid down in a book of authority:—"It seems to me that a copyholder of inheritance cannot, without a special custom, dig for mines, neither can the lord dig in the copyholder's lands, for the great prejudice he would do to the copyhold estate; and the copyholder himself seems to have no interest in the inheritance." (*t*)

*854. It seems also now to be settled, that if the lord enter upon the copyhold tenant's lands to dig for mines without his consent, the [*662] latter may have his remedy against him as a trespasser. This last point was however disputed in one case, although the Court inclined to the opinion that such an entry by the lord would be a trespass. (*u*) In a prior case, where the lord granted all coal-mines within a manor (parcel of which was copyhold for life) to J. S., after which he entered the copyhold land, and dug a new pit therein during the life of the copyholder, and took the coals, held, that the lessee might have his action against the lessor, for neither the lessee nor the lessor could enter upon the copyhold to dig the coals, for the copyholder should have trespass for breaking his close, and digging his coals; (*v*) so, in a subsequent case, the Lord Chancellor held,

(*l*) *Blacket v. Lowes*, 2 M. & S. 494. (*m*) *Foley v. Wilson*, 11 East, 56.

(*n*) *Anon.*, 11 Mod. 95; and see also *Brownl.* 421; *Ailner's case*, 1 Keb. 691.

(*o*) *Moor*, 814.

(*p*) 4 Co. 62.

(*q*) *Cro. Car.* 242; *S. C.*, *Palm.* 327.

(*r*) 7 T. R. 13.

(*s*) 9 Bing. 384.

(*t*) *Gilb. Ten.* 327.

(*u*) *Rutland (Countess) v. Gie*, 1 Sid. 152; *S. C. nom.* *Countess of Rutland's case*, 1 Lev. 107; *S. C. nom.* *Rutland (Lord) v. Greene*, 1 Keb. 558.

(*v*) *Player v. Roberts*, W. Jo. 243.

that if there were no custom to regulate it, neither a customary tenant without license from the lord, nor the lord without the consent of the tenant, could open and work new mines.(x) In *Bourne v. Taylor*,(y) where all the above-mentioned cases (see *supra*, § 853) are cited and commented upon, it was expressly held, that the lord of a manor, as such, has no right, without a custom, to enter upon the copyholds within his manor, under which there are mines and veins of coal, in order to bore for and work the same, and the copyholder may maintain trespass against him for so doing; and, lastly, it is said in *Grey v. Northumberland (Duke)*,(z) “From that case, (*viz.* *Bourne v. Taylor*, *sup.*), I collect that the lord of a manor may be in the same situation with respect to mines as in respect to trees; that is, the property may be in him; but it does not follow that he can enter and take it, without consent, which must be acquired by purchase or otherwise.”(a)

[*663] *855. The possessory right of the tenant extends so far that the possession is in him, from the surface down to the centre of the earth, according to the general rule, that he who has the surface has the subsoil, and he may recover substantial damages for any actual injury done to the surface; therefore it was held, that the trespass was maintainable by a copyholder against the owner of an adjoining colliery, for breaking and entering the subsoil and taking coal therein, although no trespass was committed on the surface, *Lewis v. Branthwaite*;(b) and it was also said in this case, “Although the property in the mine may be in the lord, he has not such a possessory right as to maintain trespass against a wrongdoer.”(c) But as to the right to take the minerals, it appears that a copyholder may acquire a right to certain minerals by custom, as to dig marl, clay, &c., for repair, in the same manner as he acquires a right to cut down trees, see *ante*, §§ 849 et seq.:(d) yet although a distinct positive usage for the customary tenant to take the minerals might be valid in law, it is incumbent on the tenant to prove the custom, otherwise the right will remain in the lord;(e) so, although a tenant might do one sort of waste, as to cut down timber, that was no evidence that he could commit another kind of waste, as that of disposing of minerals.(f) The interest of the lord, on the other hand, is not derived from custom, but is that which he has at common law, or which is reserved to him out of his original grant.(g)

856. If the minerals are once severed from the inheritance, whether by the copyhold tenant or a stranger, the lord will be entitled to recover them in an action of trover, for they are like trees felled, which belong as per-

(x) *Winton (Bishop) v. Knight*, 1 P. Wms. 406.

(y) 10 East, 189.

(z) 17 Ves. 282.

(a) *Per* Ld. Eldon, C.; *Grey v. Northumberland (Duke)*, 17 Ves. 282.

(b) 3 B. & Ad. 437.

(c) *Per* Little Dale, J., *Lewis v. Branthwaite*, 3 B. & Ad. 437.

(d) *Winchester (Bishop) v. Knight*, 1 P. Wms. 406; *Gillb. Ten.* 327.

(e) *Rowe v. Brenton*, 8 B. & C. 737; *S. C.*, 3 Man. & Ry. 133.

(f) *Winchester (Bishop) v. Knight*, *sup.*

(g) *Folkard v. Hemmett*, 5 T. R. 417, n.

sonal chattels *to the owner, whose right of possession has accrued, see ante, § 25; *(h)* and so, where the lord himself granted all the [*664] coals within the manor for a term, and afterwards entered upon the copyhold and dug for coals, it was held, that the lessee might recover those that were so dug. *(i)*

857. Mines are a part of the demesnes of a manor, and not a distinct property from the freehold; therefore, if it is intended to except them from the grant of any waste on the enfranchisement of copyholds, the right must be reserved in expressed terms; thus, where, by the terms of an inclosure act, a certain portion of the wastes of the manor was allotted to the lord in lieu of his right and interest in the soil, and the residue was to be allotted to the several tenants in fee, discharged from all customary tenures, rents, fines, &c., a saving clause, reserving all seigniories incident to the manor, and all rents, fines, services, &c., and all other royalties and manorial jurisdictions whatsoever, will not reserve mines under those allotments to the tenants; *(k)* although it appeared by a lease that was unexpired at the time of passing the act, that the right of digging for the mines had been exercised by the lord of the manor, *(k)* it being held, that the mines are part of the soil, and passed by that word in the allotments to the several proprietors, and that under the saving clause nothing was reserved to the lord but rights of an incorporeal nature, which are quite distinct from the soil. *(k)*

3. Right of Common.

858. By presumption in law, the exclusive property in all wastes and commons belongs to the lord, but evidence may be adduced to shew that commoners or others have also an interest; and although a custom to exclude the lord totally from the profits of the soil would be unreasonable, yet a prescription *to have the sole right of pasture to the exclusion of the [*665] lord has been established; *(l)* for, notwithstanding this prescription for the sole pasture, yet the soil is the lord's, and he has mines, trees, bushes, &c., and he may dig for turves; *(m)* and it is said, that such a grant, that is, of the sole pasturage, would be good at this day; *(m)* so, a lord might grant to his tenants to have common, excluding himself, but such a common is not good by prescription; *(m)* so, though the lord may establish his general right to all tin mines within the manor, yet consistently therewith the tenants of certain tenements in a vill within the manor, some of them freehold, and some customary, may by acts of ownership for more than twenty years,

(h) *Player v. Roberts*, W. Jo. 243; *Rowe v. Brenton*, 8 B. & C. 737; ^a S. C., 3 Man. & Ry. 133.

(i) *Player v. Roberts*, sup.

(k) *Townley v. Gibson*, 2 T. R. 701.

(l) *North v. Coe*, Vaugh. 251; S. C. nom. *North v. Cox*, 1 Lev. 253; *Hoskins v. Robins*, 2 Saund. 321; S. C., 1 Vent. 123; S. C. nom. *Hopkins v. Robinson*, 2 Lev. 2; S. C., 1 Mod. 74; 2 Pollexf. 13; 2 Keb. 842; see also *Kentick v. Pargiter*, Cro. Jac. 208; S. C. nom. *Kenrick v. Pargiter*, Yelv. 129; *Douglas v. Kendal*, Cro. Jac. 256; *Pitt v. Chick*, Hutt. 45.

(m) 1 Mod. 74.

^aEng. Com. Law Reps. xv. 335.

establish their right to copper mines, as well under the waste and customary lands as under the freehold lands.(n)

859. "The lord by granting rights of common on his waste does not thereby exclude himself or his tenants from all use of the waste on which the right of common is to be exercised, but merely grants to others, in common with himself and his tenants, certain rights upon that waste; all that the lord has not granted remains in him. He may, therefore, apply the waste to any purposes not inconsistent with the rights which he has previously granted to the commoners;"(o) but an unlimited and unrestricted right to abridge the rights of the commoners,, and to confer in severalty upon any person, from time to time, such portions of the waste as the lord in his discretion should think fit, has been held to be utterly inconsistent with an existing right of common, and as tending to annihilate the rights of the commoners altogether, *Arlett v. Ellis,(p) recognising Badger v. [666] Ford,(q) where a custom for the lord to grant leases of the waste of the manor without restriction was held bad in point of law, and distinguishing these cases from Bateson v. Green,(r) where the right of digging for clay, having been proved to have existed at all times in the lord, was held to be good, although it partially abridged the rights of the commoners; also from Clarkson v. Woodhouse,(s) where a custom, that when certain particular portions of land, which had been destined for turbary, ceased to have the power of producing turbary, the owner of the waste should be at liberty to take that portion to himself, was held good; because the owner in that case took nothing from the commoners which had been originally appropriated to them for purposes of pasture;(s) also from Folkard v. Hemmett, where the grant of the soil of the waste by the lord was held to be good, because such grant had been made with the consent of the homage;(t) see further on the rights and interest of the lord and the commoner, ante, §§ 314 et seq.

860. A copyholder can claim right of common by custom only, for he has common by reason of the custom, which annexes the same to his customary estates, and therefore if a copyholder purchase the freehold of his copyhold estate, his right of common is destroyed;(x) and where copyholders claim common on the several pasture in the lord's soil, it is not necessary to show what estate they have in their copyholds, for be their several estates either in fee, or for life, or for years, yet the custom hath annexed this sole pasture as a profit à prendre to their estates for the time being;(y) so, therefore, where a man stated himself to be a customary tenant of a manor, according [667] to the custom of the manor, of lands *which were parcel of the manor, and holden by copy of the court-rolls, it was held sufficient to support his claim to common, without adding that he was tenant "at the

(n) Curtis v. Daniel, 10 East, 273.

(o) Per Bailey, J., Arlett v. Ellis, 7 B. & C. 362.

(p) 7 B. & C. 365.

(q) 3 B. & A. 153.

(r) 5 T. R. 411.

(s) 4 T. R. 412, n.

(t) Id. 368.

(x) Marsham v. Hunter, Cro. Jac. 253.

(y) Hoskins v. Robins, 2 Saund. 324; ante, § 858.

*Eng. Com. Law Reps. xiv. 53. Id. v. 247.

will of the lord;"(z) but it is otherwise with respect to any tenants of freehold estates at common law, for if they claim any such benefit, they must show their estates, and prescribe in the name of the tenant in the fee by a *que estate*;(z) copyholders, however, cannot as a rule claim common by prescription, for they cannot prescribe at all against their lord, nor against any other, but only in the name of their lord;(z) see further as to prescription by copyholders, under TITLE TO THINGS REAL.

A claim of common by a copyholder, to be good, must be both certain and reasonable.(a) It is a good custom for a copyholder to have the lopplings of the trees, and that on that account the trees should not be cut down by the lord, because the tenant has a future as well as present interest in the trees;(b) so, a copyholder may claim estover, and a custom to cut down wood for repairs or other necessary uses is good;(c) but such a custom will not warrant the sale of the wood;(c) unless sold to defray charges of reparation;(d) so, a custom to dig for limestone, marl, clay, and gravel, for the same purposes;(e) but in that case it is necessary to allege not only that the house was out of repair, but that the party entered for the purpose of getting materials for the necessary repairs of the house, and that they were used for that purpose;(f) so, a custom for a copyholder to have turbary sufficient for the house to which it is appendant is good,(g) or to dig for materials for the *improvement of the land,(h) but not to cut turf [*668] without limit, for the ornament of the garden, or for any other fanciful improvement;(h) so, a custom for the proprietors of ships to dig for ballast is good, because it is for the maintenance of navigation;(i) but a custom for the lord, or a customary tenant, to sink pits in the land of other customary tenants, and to lay the coals on the land, and let them remain there an indefinite time, and to lay wood and other materials there at his pleasure, held to be a bad custom, as being both uncertain and unreasonable.(k)

4. *Wardships, &c.*

861. There are some other rights to which the lord of the manor may be sometimes entitled, namely, a right to appoint a guardian, and a right to the custody of lunatics, or to the lands of an alien. The first of these, as before observed, is not of common right, see ante, § 817; and as to the second, it is not settled whether the lord has any power over the land of a lunatic, except by custom; therefore, where the lord had granted the custody of a lunatic's copyhold land, the Court held, that an action touching the land was to be brought in the name of the lunatic, for that no interest was gained in the land by the committee, he being no more than a bailiff, *Cocks v. Dar-*

(z) *Crowther v. Oldfield*, 2 Ld. Raym. 1225.

(a) 1 Inst. 59; 1 Leon. 11; Davis, 32, 33; 1 Roll. Abr. 565; 2 Roll. Abr. 264.

(b) *Stebbing v. Gosnal*, Cro. El. 629.

(c) *Foley v. Wilsen*, 11 East, 56.

(d) *Sandford v. Stevens*, 3 Bulst. 282.

(e) *Duberley v. Page*, 2 T. R. 391.

(f) *Peppin v. Skakespear*, 6 T. R. 741.

(g) *Tyrringham's case*, 4 Co. 37.

(h) *Wilson v. Willes*, 7 East, 127.

(i) *Lynn Regis (Mayor, &c.) v. Taylor*, 3 Lev. 160.

(k) *Broadbent v. Wilks*, Willes, 360.

son ;(*l*) and it was there said, that the lord had no power over the lunatic's land without a custom, for the imitation of the king's power over freeholds was not a consequence, for although the 17 E. 2 (Stat. Prerog.) was but an affirmance of the common law in the case of the king, yet the collateral incidents of estates, as dower, curtesy, wardship, and the like, were not without special custom ;(*l*) but in Beverley's case(*m*) it is said that the king shall not have the custody of the land *which an idiot holds by copy, for that is but an estate at will by the common law, it would be a great prejudice to the lord of the manor ; yet, held in another case, that an alienation made by an idiot after office found should be avoided ;(*n*) an idiot, however, could not be ordered in the Court of Wards for his copyhold, it being the rule that if an idiot had not any goods or chattels, or lands, except copyhold lands holden of a common person, the king should not have the custody, but the lord of whom the copyhold is holden ; but if he had any other lands, then the copyhold land also ;(*o*) and so, where a copyholder was *mutus et surdus*, it was held, that the lord and not the king, should have the custody, for otherwise the lord should be prejudiced in his rents and services.(*p*)

862. In the case of copyhold lands purchased by an alien, as he cannot retain them, it seems not to be settled whether the queen or the lord may take advantage of the purchase, but the better opinion appears to be that the queen cannot take them except as a trust ;(*q*) see further, ante, § 832 ; and as to the copyholder's power to grant leases, see post, § 1399.



[*670] *V. How a Copyhold may be lost or destroyed.

§ 863. A copyhold estate may be lost or destroyed in three ways, namely,
1. By extinguishment. 2. By forfeiture. 3. By enfranchisement.

(*l*) Hob. 215 ; S. C., Noy ; Poph. 141.

(*m*) 4 Co. 126 b.

(*n*) Dy. 302, recognized in Beverley's case, 4 Co. 124.

(*o*) Roger's case, cited marg. Dy. 302.

(*p*) Eavers v. Skinner, Cro. J. 105.

(*q*) 1 Dy. marg. 2 b ; Id. marg. 302 ; R. v. Holland, Sty. 20. 40. 75. 81 S. C., All. 14.

I. Extinguishment of a Copyhold.

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| <p>§ 864. Copyhold coming to the Freehold.
 865. Freehold coming to the Copyhold.
 866. Partial or total Extinguishment.
 867. Suspension or Extinguishment.
 868. Effect of Unity of Possession in the same Person.
 869. Unity of Possession in the same Person in different Rights.</p> | <p>§ 870. Consequences of the Extinguishment.
 Copyhold Lands pass with the Manor, when.
 Merger.
 871. Extinguishment of the Incidents to the Copyhold, or otherwise.</p> |
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§ 864. A copyhold is said to be extinguished when the freehold and copyhold interest unite in the same person and in the same right, which may be either by the copyhold interest coming to the freehold, or by the freehold interest coming to the copyhold.(*r*)

The copyhold may come to the freehold if the copyholder conveys his interest to the lord, whether by surrender or release, or bargain and sale ;(*s*) so, if the lord sell the freehold of inheritance of the copyhold to another, and then the copyholder release to the purchaser, this will extinguish the copyhold, for although a release could not in its own nature [according to the old law(*t*)] pass away a possession, yet it *might amount to a [*671] signification of the tenant's mind ;(*u*) and a copyholder being but a tenant at will, anything amounting to a determination of the copyholder's will is sufficient to extinguish the copyhold, as if a copyholder comes into court and says that he is weary of his copyhold, and requests the lord to take it, that is a surrender ;(*x*) and in one case it was held, that a copyholder accepting his land to hold of the lord by bill, under his hands, instead of by copy, determined the copyhold interest ;(*y*) so, if the copyholder surrender to the use of the lord, (even though the lord be a disseisor,) it was much questioned whether this were an extinguishment or not, *Moor v. Pit* ;(*z*) but the Court of C. P. was of opinion in this case, that it was a void surrender, and the copyhold not extinguished,(*a*) and this judgment was affirmed in error.(*b*)

So, if lands escheat or are forfeited to the lord, it is an extinguishment of the copyhold interest.(*c*)

Although the lord may determine his estate by any act, yet the lord cannot destroy the estate of the copyholder by any act of his, as by the severance of the freehold of the land held by copy, for the custom has

(*r*) 2 Gilb. Ten. 300.

(*s*) *Blemmerhasset v. Humberstone*, Hutt. 65 ; S. C. nom. *Blenerhasset v. Humberstone*, W. Jo. 41 ; S. C. nom. *Hasset and Hanson*, Winch, 166 ; *Scroggs*, 192.

(*t*) *Proc. Conv.*, 3rd edit. tit. Release.

(*u*) *Anon.*, Cro. El. 21 ; *Wakeford's case*, 1 Leon. 102 ; *Blemmerhasset v. Humberstone*, Hutt. 65.

(*x*) *Blemmerhasset v. Humberstone*, sup.

(*y*) *Collman v. Portman*, 1 Leon. 191 ; S. C. nom. *Colman v. Bedil*, 1 Andr. 199.

(*z*) 2 Mod. 287 ; S. C., 1 Freem. 24.

(*a*) *Moor v. Pit*, 1 Show. 153 ; *Skin*, 28.

(*b*) S. C., 1 Vent. 359 ; S. C., T. Jo. 154 ; see also 1 Watk. Cop. 92. 359.

(*c*) *Beverham's case*, 2 Vent. 345 ; S. C., 2 Chan. Ca. 194.

established his estate, so that the lord cannot oust him, so long as he pays and performs his customs and services.(d)

865. A copyhold interest may also be extinguished by the annexation of the freehold to the copyhold ; thus, if a copyholder in fee accept a lease for [*672] years of the same land from the lord, this determines his copyhold estate ;(e) so, *if the lord lease the copyhold to another, and the copyholder accept an assignment from the lessee.(f) If a copyholder take a conveyance of the manor in joint-tenancy, it appears that the copyhold interest will be extinguished, for joint-tenants are seised *per mie et per tout* ;(g) so, if a manor be leased for years, and a copyholder purchase the reversion in fee, by this the copyhold is destroyed, and the lessee of the manor may oust the copyholder, and hold the land during his term ;(g) so, if he accept a lease for years of the manor, it is said by some, that this is a total extinguishment of the copyhold, and the lessee may re-grant the copyhold again to whom he pleases ;(h) but, according to others, it is only a suspension of his copyhold during the term ;(i) so, if the copyholder join with the lord in a feoffment of the manor, his copyhold is thereby extinct ;(j) so, if the copyholder sues execution upon a statute, and has the manor in execution, it is said that the copyhold is gone,(k) for after the debt levied, the customary interests remains ;(l) and if the lord enfeoffs his copyholder to the use of another, his copyhold is not destroyed, for it is saved by the Stat. of Uses ;(m) so, if there be a copyhold for three lives, *habend' successivè*, and the lord by deed grants the inheritance to the first, the interest of the second is not destroyed ;(n) so, if the lord grants the freehold of a copyholder to a stranger for the life of the copyholder, his copyhold is not destroyed.(o)

866. There is a distinction between a conveyance of a portion of copyhold interest by the tenant to the lord, *and a conveyance of a portion of the freehold by the lord to the tenant, for the former operates as an extinguishment of the part only conveyed to the lord, and the latter as an extinguishment of the whole tenancy ;(p) therefore, if a copyholder in fee surrender to the use of the lord for life, with remainder over to a stranger, or reserving the reversion to himself, it will be an extinguishment only of the estate so limited to the lord, but will not affect the remainder or reversion ;(q) but, if a copyholder in fee accept a common-law lease of his copyhold tenement from the lord or his grantee, the whole copyhold interest will be extinguished.(r)

(d) Lane's case, 2 Co. 17 a.

(e) Ib. ; S. C. nom. Smith and Lane's case, 1 Leon. 170 ; 1 Anders. 191 ; Gouldsb. 34, ca. 9 ; Hide's case, 4 Co. 31 b ; S. C. Hide and Newport, Moor, 185 ; see also Kitch. 171 ; Co. Cop., s. 62, tr. 141, 142 ; 1 Watk. Cop. 360.

(f) Smith and Lane's case, 1 Leon. 170 ; 1 Anders. 191 ; Gouldsb. 34, ca. 9.

(g) Calth. 74. (h) Anon., Moor, 185, ca. 330, citing Hide and Newport, sup.

(i) Gybson v. Searls, Cro. Jac. 84 ; Sav. 78, ca. 146.

(j) Godb. 11.

(k) Com. Dig. Copyhold, (L.) sed contra, Sav. 70.

(l) Sav. 70.

(m) Lillingston's case, 7 Co. 39, a. (n) Curtis and Cottel's case, 2 Leon. 72.

(o) Howard v. Bartlett, Hob. 181.

(p) Kitch. 171.

(q) Podger's case, 9 Co. 106, 107 ; Co. Cop., s. 34, tr. 72 ; see also Curtis and Cottel's case, 2 Leon. 72.

(r) Lane's case, 2 Co. 17 a ; see ante, § 865.

867. So long as the demisable quality of the estate subsists, the copyhold is not extinct ; therefore, where copyholds come into the Lord's hands by forfeiture or escheat, &c., he may re-grant them by the custom of the manor ;(s) but, if he make a common-law lease, for life, or years, or any other certain time, the copyhold is destroyed, because, during those estates it was neither demised nor demisable by copy ;(t) but if the lord keeps it in his hands, or only lets it at will, he, his heirs or assigns, may well re-grant it at his pleasure.(u)

868. To cause a complete extinguishment of the copyhold estate by unity of possession, they must be united in the same person ; therefore, if one seised of a manor in right of his wife, let lands by indenture for years, this does not destroy the custom as to the *feme*, it only suspends it, for after the death of the husband she may demise it by copy again ;(x) but in one case it was held, that where copyholder in fee married a seignioress, and they suffered a common *recovery to the use of themselves for life, [*674] remainder over, it operated as an extinguishment, because the husband gained a freehold ;(y) so, on the same principle, if a person having a limited interest only in a manor, as tenant for life, lets a copyhold parcel of the manor for years, the demisable quality of the land is not destroyed, but only suspended as to him during his life, and after his death, or the determination of the particular estate, the remainder-man or reversioner may re-grant by copy.(z)

869. Again, to cause a total extinguishment of the copyhold, there must be unity of possession in the same person in the same right, but where the interest is united in the same person in different rights, there the copyhold interest will be suspended only and not extinguished ; therefore, if a copyholder in his own right become seised of the manor, or of the freehold interest in his copyhold tenement, in right of another only, or *vice versá*, the copyhold interest will be suspended during the union of such interests, Lane's case ;(a) see also Gage v. Acton,(b) where this doctrine is applied to common-law interests.

870. Copyhold premises which become extinct by the union of the copyhold and freehold will enure to the benefit of either a devisee or a mortgagee ; held, therefore, that under a devise of a manor, copyhold premises parcel thereof, which were purchased by and surrendered to the lord subsequent to the making of the will, will pass, and this notwithstanding a subsequent demise from year to year by the deviser, for, notwithstanding the purchase of the copyhold by the lord, it still remained parcel of the manor ;(c) so, where a lord mortgaged the manor in fee and afterwards purchased copyholds held of the manor, it had been *previously decided that they should enure to the benefit of the mortgagee ;(d) so, [*675]

(s) 1 Inst. 58.

(t) French's case, 4 Co. 31.

(u) *Ib.* ; see also *Pemble v. Stern*, 2 Keb. 213 ; S. C., T. Raym. 165 ; see further, ante, § 821.

(x) Co. Cop., s. 62, tr. 142.

(y) *Anon.*, Cro. El. 8.

(z) *Conesbie v. Rusky*, Cro. El. 459, b ; *Field v. Boothby*, 2 Sid. 17. 35. 81. 137

(a) 2 Co. 17 ; 1 Walk. Cop. 358.

(b) 1 Salk. 326

(c) *Hale v. Wegg*, 6 T. R. 708.

(d) *Gibbons v. Pott*, 2 Dougl. 710.

where copyhold premises are purchased by the lord, tenant for life of the manor, with remainder over, they will, if not re-granted, merge in the inheritance of the manor, for the benefit of the remainder-man; *(e)* so, likewise, for the benefit of an executory devise; *(f)* but where there is a union of a fee of a customary freehold with the estate for life of the lord of the manor, that was held to suspend the seigniorship during the lord's life, and that at his death the seigniorship revived, and the fee of the customary tenements descended to his heir, *Bingham v. Woodgate*. *(g)* In this case it is said, "that, if the lord had been seised of the fee of the manor, then the union would have extinguished the customary tenements, but extinguishment takes place only when the two estates have the same duration." *(h)*

871. It seems to be settled that the customs of freebench, curtesy, &c. will cease with the extinguishment of the copyhold tenure, by any union of freehold and copyhold interests; *(i)* but with regard to common it is otherwise, for that is extinguished only in particular cases.

If, by custom, all the copyholders for life have common in the waste of the lord, and the lord grant to one and his heirs all his copyhold messuage and land *cum pertinentiis*, he shall not have common, for by the custom the common was annexed to the customary estate, which being destroyed by his own act in making it a freehold, his common is destroyed with it; *(k)* *sed secus*, if he have common in the soil of a stranger, see further, post, § 899.

[*676] But if *copyholders for life have used to have common in the waste of the lord, or estovers in his woods, or other profits *à pendre* in any parcel of the manor, and the lord alien his wastes or woods to another, who afterwards grants a copyhold messuage for life, such grantee shall have common, estovers, &c., notwithstanding the severance, for the title of the copyholder is paramount, and the custom unites the common, which is but as accessory or incident, so long as the messuage, which is the principal, is maintained by the custom; *(l)* so, by a grant of a manor, with the exception of the wastes, though they are thereby severed from the manor, yet the copyholders continue to have a right of common by immemorial custom. *(m)*

(e) *St. Paul v. Viscount Dudley and Ward*, 15 Ves. 167.

(f) *King v. Moody*, 2 Sim. & Stu. 579.

(g) 1 Russ. & My. 32.

(h) Per Sir J. Leach, M. R., *Bingham v. Woodgate*, 1 Russ. & My. 32,

(i) *Lashmer v. Avery*, Cro. Jac. 126; 2 Sid. 19; *Dugworth v. Radford*, W. Jo. 462.

(k) *Marshall re Hunter v. Marshall*, Cro. Jac. 253; S. C., Yelv. 189; Noy, 126.

(l) *Swayne's case*, 3 Co. 63; S. C., nom. *Swain v. Becket*, Moor, 812.

(m) *Revell v. Jodrell*, 2 T. R. 415.

II. Forfeiture.

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| <p>§ 873. Forfeiture for Treason or Felony.
 874. Forfeiture for Alienation.
 875. By making Leases.
 Other Cases of Forfeiture.
 876. Cases where there is no Forfeiture.
 877. Forfeiture by committing Waste.
 878. Exceptions to the Law of Waste.
 879. Forfeiture by Inclosure.
 880. Forfeiture by denying Services.
 Summons, what to be.
 Excuses, &c.
 882. Forfeiture by Tenant.
 Not by Disseisor.
 Nor by Surrenderee.
 Nor by Guardian.
 If done by a Stranger
 by Tenant for Life.
 by Tenant in Tail.
 883. As to, if done by Persons under
 Disabilities.</p> | <p>§ 883. Exceptions.
 Feme covert.
 884. Infant.
 885. Lord only can take Advantage of a
 Forfeiture.
 886. Forfeiture to the Lord, not to the
 Queen.
 Forfeiture to Coparcener.
 887. Extent of the Forfeiture.
 When holden by one Tenure or
 otherwise.
 888. How a Forfeiture may be dispensed
 with.
 889. By what Lord.
 890. What not a dispensation.
 891. Forfeiture may be taken Advantage
 of by Entry.
 892. Presentment, when necessary, or
 otherwise.
 Not necessary.</p> |
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893. Necessary.

*§ 872. The law of forfeiture as regards copyholds is in many respects different from that which regards lands of socage tenure; [*677] as to—

1. The causes of forfeiture.
2. Persons subject to the forfeiture.
3. Who may take advantage of a forfeiture.
4. Extent of a forfeiture, and its consequences.

1. *The Causes of Forfeiture.*

The principal causes of forfeiture are as follow:—For treason or felony, alienation, waste, inclosure, and denying services.

873. If a copyholder commits treason, his estate is forfeited to the lord, not to the queen, except by the express words of an Act of Parliament; (*n*) so, if a copyholder commits felony, his estate is forfeited to the lord by custom; (*o*) and a custom, that if a copyholder commits felony, upon presentment of the homage the lord shall enter, is good; (*p*) but there cannot be a forfeiture of copyhold by conviction before attainder, unless there be a special custom in the manor to the contrary, *R. v. Willes*, (*q*) recognizing *Stevens's* case, (*r*) and *Lord Cornwallis's* case, (*s*) in the former of which cases it was held, that there could be no forfeiture before attainder, and in the latter, no seizure before attainder, without a custom; (*t*) so, if convicted of man-

(*n*) 2 Vent. 39. (*o*) *Beneson and Strode*, Skinn. 8; Pollexf. 615; T. Jo. 189.

(*p*) *Borneford and Packington's* case, 1 Leon. 1; *S. P., Gittins v. Cowper*, 2 Brownl. 217.

(*q*) 3 B. & A. 510.^a (*r*) *Cro. Car.* 556. (*s*) 2 Vent. 38.

(*t*) *R. v. Willes*, 3 B. & A. 510;^a see also *Godbolt*, 267; 1 Bulstr. 13.

^aEng. Com. Law Reps. v. 361.

slaughter, he does not forfeit without a special custom ;(u) so, not for outlawry, unless it be for a capital crime.(x)

[*678] *874. If a copyholder makes an alienation by deed, it is a forfeiture by the general law of copyholds,(y) as a charter of feoffment ;(z) and it is said, that if a letter of attorney be given to make livery, it will be a forfeiture, although no livery be made.(a) So, as a release grounded on a bargain and sale for a year, and also a bargain and sale inrolled, pass only the interest which the releasor and bargainor may lawfully transfer, they have been held to be no forfeiture of the copyhold of which advantage can be taken ;(b) so, if a copyholder for life makes a surrender to the use of another, in fee, this is no cause of forfeiture,(c) because a surrender like a bargain and sale, passes no more than what the surrenderor may lawfully convey.(c)

875. A lease for one year only by a copyholder is no forfeiture, being warranted by the general custom of the realm,(d) and the lessee may maintain ejectment ;(d) and see also 9 Co. 75 b ; 1 Cro. El. 224, 394 ; Cro. Jac. 403 ; 1 Leon. 328 ; Poph. 188 ; Ow. 18 ; Litt. Rep. 223 ; Heil. 126 ; Anders. 192 ; Moor, 272 ; where it appears that it was once doubted whether to warrant a lease even for one year a special custom was not necessary. If a copyholder takes upon him to make leases, not warranted by the custom of the manor, and without the lord's license, this is a forfeiture of his copyhold, but it is no disseisin to the lord, for the lease is good against every one but the lord ;(e) and it is immaterial whether such lease be by parol or in writing ;(f) but a lease to amount to a forfeiture must be

[*679] a* perfect lease, having a certain beginning and a certain end, otherwise it is void, and carries but an estate at will at most, which is no forfeiture ;(g) so, if the words of a lease were doubtful, so that they might be construed into a covenant, the Court, to prevent a forfeiture, would take it to be a covenant ;(h) but where A., a copyholder for life, having got B. to be bound with him in 100*l.*, gave him a deed, in which he covenanted that B. should enjoy the lands for seven years, and so from seven years to seven years, during the term of forty-nine years, if A. should so long live, held, that these words were so clear and plain, that they amounted to a lease, and, consequently, created a forfeiture ;(h) on the other hand, where a copyholder, by articles of agreement, covenanted with another that he should hold for a year *at halves, according to the custom* of the manor, held, that these words so tied up the lease, that if there were no custom to warrant this manner of leasing, the lease itself fell to the ground, besides that there was a further clause, that if the lessor put out the lessee, he should be

(u) Jory v. Pawly, 1 Lev. 263 ; S. C., 2 Keb. 451.

(x) Litt. Rep. 234 ; Hetl. 127.

(y) Litt., sect. 74.

(z) 1 Roll. Abr. 508, pl. 12, 13.

(a) *Ib.* ; but see *contra*, Taverner and Cromwell's case, 3 Leon. 109 ; Godb. 269 ; Harg. Co. Litt. 59. a., n. (3), ca. 374 ; 1 Watk. 327 ; 1 Scriv. Cop. 531, 3d ed.

(b) Taverner and Cromwell's case, *sup.* ; 1 Inst. 59, b. ; Godb. 269, ca. 374 ; 2 Danv. 195.

(c) Foxton and Colston, cited 4 Co. 23 ; Co. Cop., s. 57, tr. 76 ; Oldcot v. Levell, Moor, 753 ; Bird and Kirby, Cart. 238.

(d) Melwich and Luther, 4 Co. 26 a ; S. C. nom. Melwich v. Luther, 1 Cro. El. 102.

(e) Moor, 184 ; 1 Salk. 186, pl. 5. (f) Moor, 332.

(g) Gilb. Ten. 232.

(h) Richards v. Seley, 2 Mod. 79.

allowed so much rent by way of retainer, making it therefore uncertain whether he should enjoy the lease during the whole of the term; so that upon the whole construction this was held to be a covenant, not a lease, and adjudged to be no forfeiture; *(i)* see also *Hare v. Celey*, *(k)* where *exposing to half* was held to be no lease, it is only a liberty to plough and sow.

To prevent forfeiture, and yet enable the copyholder to grant a larger interest than what the custom warranted, various devices have been resorted to, but for the most part with little success; thus, where a copyholder for life made a lease for a year by indenture dated such a day, and the same day, by another indenture made a second lease to the same party for a year, to commence such a day, being two days after the expiration of the first lease, and by other indentures made other leases, leaving between each lease **two days*, it was agreed that whether the custom of the manor, or the general custom of the realm, allows a copyholder to make a [**680*] lease for a year, this ought to be a lease in possession, and he cannot, after such a lease made, make another in reversion; and these three leases being made all at one time, shall be intended one entire contract, and so a lease for three years, which is more than the custom warrants, and consequently, a forfeiture; *(l)* and the intervention of the two days between two days was held to be fraud and covin, to defeat the lord of his forfeiture, which should not avail; *(l)* and so, where a copyholder made a lease for one year, and covenanted with the lessee that he should enjoy the land *de anno annum* for ten years, this is clearly a good lease for ten years, and will make a forfeiture; *(m)* and so a lease for one year only, saving the last day, and *sic de anno in annum*, is a forfeiture, for, at the least, this is a lease for two years, and might be for twenty, or what other time he thought fit, which the law will not permit. *(n)*

876. But in some cases parties have succeeded in avoiding a forfeiture, as where a lease was made by a copyholder for a year, with a covenant to renew yearly for ten years, which has been adjudged to be no forfeiture, because the lessee had, in that case, no lawful estate but for one year; *(o)* so, where it was only an agreement for a lease, not amounting to a present demise, and there was a clause for procuring the license of the lord, held, that this was no forfeiture; *(p)* so, where a copyholder demised for one year, and after from year to year for thirteen years more, "if the lord would license the same, and so as the same should not be **liable to forfeiture*," [**681*] adjudged, that it was not a lease for fourteen years, and an ejectment would lie after the expiration of the first year; *(q)* see also *Luffkin v. Nunn*, *(r)* where it was held, that if the tenant be evicted by such ejectment, no action can be maintained on the covenant for quiet enjoyment; *(s)* so, on a demise of freehold and copyhold lands at one entire

(i) *Lenthall v. Thomas*, 2 Keb. 267.

(k) 1 Cro. El. 143.

(l) *Matthews v. Whetton*, Cro. Car. 233; S. C. nom. *Mathewes v. Whetton*, W. Jo. 249; S. C. nom. *Mathewes v. Wheaton*, 1 Roll. Abr. 508.

(m) *Lady Montague's case*, Cro. Jac. 301; S. C., 1 Bulstr. 190.

(n) *Lutterel v. Weston*, Cro. Jac. 308; S. C., 1 Bulstr. 215; S. C., 1 Roll. Abr. 507.

(o) *Lady Montague's case*, sup.; see also 1 Roll. Abr. 848; 3 Bulstr. 252; Bac. Abr., tit. *Leases and Terms for Years*, (I. 6.)

(p) *Coore v. Clare*, T. R. 739.

(q) *Nunn v. Luffkin*, 4 East, 221; S. C., 1 Smith, 90.

(r) 1 N. R. 163.

(s) *Luffkin v. Nunn*, 1 N. R. 163.

rent, *habendum* as to the copyhold for three years, warranted by the custom, with a covenant for renewal of the copyhold every three years, and that in the meantime and until such new lease should be executed, the lessee should hold the land, copyhold as well as freehold, according to the terms of the lease, adjudged to be a lease for three years only,^(t) and it was there said, "Lady Montague's case^(u) is in point, and the defendant's remedy lies on the covenant, for the Court cannot, by construction, in order to avoid circuity of action, make words which import only a covenant a lease inconsistent with the nature of the estate."^(v)

877. Waste is either voluntary or permissive. Voluntary waste is a forfeiture by the common law, see post, under TITLE to THINGS REAL; but negligent waste is said not to be so without a custom;^(x) the authorities, however, are the other way, for my Lord Coke says, if there be no custom to the contrary, waste, either permissive or voluntary, of a copyholder is a forfeiture of his copyhold.^(y) If a copyholder cuts down trees for repairs, and does not repair, it is a forfeiture;^(z) so, if he employ them for repair of [*682] other tenements, it will be a forfeiture;^(a) so, if he does anything to change the nature of the estate,^(b) as to pull down house newly built upon the copyhold,^(b) or build a new house, (*sed quære*, see infra, § 878,) or turn arable land into a hop ground, *sed quære*, see infra, § 878; so, if he opens a new stone quarry, it is a forfeiture,^(c) (see ante, § 853, as to the copyholder's interest in minerals;) so, if he grubs up hedges and destroys boundaries;^(c) so, if he tops timber trees and makes them pollards.^(d)

878. If a copyholder cuts down timber for repairs, it is not waste, for he may do so without a special custom;^(e) so, though he cuts down more than he wants for immediate use, provided he keeps the residue for future use, for he may not know precisely how much is necessary;^(e) and so adjudged, although the timber was not employed for five years, nor until after an entry for a forfeiture;^(e) and it is a question for the jury to decide whether the trees were cut *bonâ fide* for repair, and were in a course of application for that purpose.^(f)

So, where a copyholder may take trees for reparation, the loppings and tops belong to him, and he may sell them to help to defray the charges;^(g) see ante, as to the copyholder's interest in trees, § 848 et seq.

Whether turning ploughed lands to hop ground, or to a piscary, is waste, is not settled, but the better opinion is, that as a rule, whatever change will better the land, it will not be a forfeiture;^(h) so, as to the copyholder build-

(t) Fenny v. Child, 2 M. & S. 255.

(u) Cro. Jac. 301; S. C., 1 Bulstr. 190.

(v) Per Dampier, J., Fenney v. Child, sup.

(x) Noy, 51.

(y) 1 Inst. 63, a.; see also East v. Harding, Moor, 392; Ow. 17; 1 Roll. Abr. 508, pl. 16; Estcourt and Weeks, 1 Lutw. 799; 1 Freem. 516; 1 Salk. 186.

(z) East v. Harding, 1 Cro. El. 498; S. C., Moor, 392.

(a) Nash v. Derby, (Earl) 2 Vern. 537.

(b) 1 Bulst. 51.

(c) 1 Roll. Abr. 508.

(d) Peachy v. Somersct, (Duke) 1 Str. 447.

(e) East v. Harding, 2 Cro. El. 498; S. C., Moor, 392.

(f) Foley v. Wilson, 11 East, 56.

(g) 3 Bulst. 281.

(h) Paston v. Mann, Hct. 8; S. C., Litt. Rep. 267, 268.

ing a new house upon the copyhold, it is said by some to be a forfeiture, because it alters the nature of the thing; (*h*) but, *by others, not a forfeiture, because it is for the melioration of the land; (*i*) but then the house must be subject to all the customs of copyhold land, and if the copyholder pull it down again, it is waste and a forfeiture; (*i*) so, if a copyholder digs a marl pit, and marls his land, it is not a forfeiture, because it betterers the land, although at common law it is said to be a forfeiture; (*k*) so, it is no forfeiture, if a copyholder of inheritance, who by custom may cut timber, does waste. (*l*)

879. Inclosing copyhold lands one from another is a forfeiture, so also destroying land-marks, (*m*) for by these means the evidence of their being copyhold will be destroyed; (*n*) and where a copyholder inclosed leaving certain gaps at certain distances, held, that notwithstanding the gaps, this was an inclosure against the custom; (*o*) but where an inclosure has been made for twelve or thirteen years, and seen by the steward (the same lord and steward continuing all the time) without any objection being made, it may be presumed by the jury to have been made by license of the lord, and ejectment cannot be brought against the tenant as a trespasser, without previous notice to throw it up being given to him. (*p*)

880. If a copyholder refuses his rent or services, it is a forfeiture; (*q*) but non-payment of rent at the day is no forfeiture, without a refusal to pay; (*r*) therefore, the lord must come upon the land and demand the rent, and if the tenant, being present, refuse to pay, it is a forfeiture; (*s*) or if he *say nothing, it is still a forfeiture; (*t*) and my Lord Coke says, [*684] that if he excuses himself for the want of money, and entreats the lord to forbear, this is a forfeiture; (*u*) and if he assigns a day certain, within the manor, for the payment, and he does not pay, this is a forfeiture, for it amounts to an absolute refusal; (*x*) so, the non-payment of a reasonable fine upon demand is a forfeiture; (*y*) *sed secus*, if it be unreasonable, or if it is doubtful whether it be reasonable, or whether it be due or not, or whether there have been an express refusal, or if there was, whether the fine have been paid within a limited time; (*z*) but it lies on the copyholder to show that it is unreasonable. (*a*)

881. So, if a copyholder, being duly summoned, refuses to appear at the court of the lord, it is a forfeiture. (*b*)

(*h*) Paston v. Mann, Hetl. 8; S. C., Litt. Rep. 267, 268.

(*i*) 1 Roll. Abr. 50; 2 Roll. Abr. 815.

(*k*) Hetl. 6, citing 41 Ed. 8, Waste, 821; 22 H. 6.

(*l*) Rocking v. Huggens, Cro. Car. 221.

(*m*) Paston v. Mann, Hetl. 8; S. C., Litt. Rep. 267, 268.

(*n*) *Ib.*; see also Peachy v. Somerset (Duke), Prec. Chan. 571; S. C., 1 Str. 449.

(*o*) Paston v. Mann, sup.

(*p*) Foley v. Wilson, 11 East, 56.

(*q*) Dy. 211 b, in marg.; 1 Roll. Abr. 506.

(*r*) Moor, 622; Litt. Rep. 268.

(*s*) Co. Cop. s. 162.

(*t*) Crisp v. Fryer, 2 Cro. El. 505.

(*u*) Co. Cop. s. 163.

(*x*) Latch, 122.

(*y*) 1 Roll. Abr. 507.

(*z*) Co. Ent. 64; Barnes v. Corke, 3 Lev. 309.

(*a*) Denny v. Lenman, Hob. 135.

(*b*) Taverner and Cromwell's case, 3 Leon. 108; 1 Roll. Abr. 506; 3 Bulst. 89, 268.

By the opinions of some, a general warrant within the parish was deemed sufficient, but the better opinion is, that there must be a particular summons made to the person, to make a forfeiture; (c) so, if he come not to be admitted on due proclamation and pay his fine; (d) so, if a copyholder refuses to be sworn upon the homage in a court-baron, (e) or when sworn refuses to present according to his oath; (e) so, if a copyholder forges a customary, (f) provided he makes use of it; (f) so, if he disclaims being tenant to the lord; (g) *sed secus*, if he comes into court and renounces his copy. (h)

But weakness or a great office may be an excuse for his not coming; (i) so, if he is in debt and afraid to be arrested; (i) *so, the refusal must [*685] be wilful and absolute, therefore, if the lord come to the copyholder and require him to do his services, and the copyholder answer, if they are due, he will do them, but it shall be tried at law first whether they are due, this is no forfeiture, being no wilful refusal; (k) so, if the copyholder says, "If it be a court, I appear; if not, I do not appear;" this is no refusal or forfeiture; (l) but if there be no controversy about the legality of the court, and this is only used as a shift, then it seems to be a forfeiture. (m)

2. Who subject to Forfeiture.

882. A forfeiture can only arise by the act of the tenant; if, therefore, a disseisor commit waste, it is no forfeiture; (n) so, if a surrenderee commits felony before admittance; (o) so, in the case of a *cestui que trust*; (p) so, if a guardian commit waste, it shall be no forfeiture of the copyhold, but he shall lose his wardship; (q) so, if a stranger commit waste, the copyholder shall not forfeit his land, for things in law, as forfeitures, conditions, and the like, are to be taken strictly; (r) so, if there be tenant for life, remainder for fee of a copyhold, and the tenant for life commits a forfeiture, this shall not bind the remainder-man; (s) but, although this shall not affect the remainder-man, yet he shall not enter, but the lord shall hold it during the life of the person committing the forfeiture; (t) so, if a lessee, a copyholder tenant in tail, commit a forfeiture, his issue is bound by it; (u) so, the forfeiture of one joint-tenant will not affect the part of the other; (u) so, if a lessee by license [*686] make a feoffment, *or cut down timber, or do any act which would be a forfeiture if done by the copyholder, this will forfeit only the estate of the lessee, and not the estate of the copyholder. (x)

883. As a rule, neither a *feme covert* of herself without the assent of her

(c) Fryer v. Crisp, 2 Cro. El. 505; S. C., Noy, 6S.

(d) Gilb. Ten. 230; 1 Watk. Cop. 315. 319.

(f) Taverner and Cromwell's case, 3 Leon. 108.

(h) 1 Roll. Abr. 107.

(k) Barnham and Higgins, Latch, 14; S. C. nom. Vernon v. Higgins, Id. 133; see also 1 Roll. Rep. 429; 3 Bulstr. 80. 268.

(l) Parker v. Cook, Sty. 241.

(m) Ib.; see also Bac. Abr. Copyhold, (L. 1.)

(n) Co. Cop., s. 59, tr. 138.

(o) Jeffereys v. Hicks, 2 Wils. 13.

(p) Co. Cop., s. 59, tr. 137; Peachy v. Somerset (Duke), 1 Str. 441; S. C., Prec. Chan. 573; Cary, 14, 15.

(q) Co. Cop., s. 59, tr. 137.

(r) 4 Leon. 241.

(s) Rastal v. Turner, 2 Cro. El. 598; S. P., Baspole v. Long, Noy, 42.

(t) Podger's case, 9 Co. 107.

(u) Co. Cop., s. 59, tr. 138.

(x) Kitch. 246.

husband, nor an infant under the age of fourteen, (being till then in ward,) nor any person *non sanæ memoriæ*, nor any idiot or lunatic, can forfeit a copyhold. By the 11 G. 4 & 1 W. 4, c. 65, s. 9, it is provided, that no forfeiture shall be incurred by infants, *femes covert*, or lunatics, for refusing to be admitted, or to pay the lord's fine; and under the 9 G. 1, c. 29, which is repealed by the 11 G. 4, it was held that if one of several co-heirs of a copyholder were a *feme covert* at the time of the ancestor's death, and the lord seized the whole estate without first appointing an attorney, it was irregular and void.(y)

To the above general rule there are several exceptions. If a *feme covert* be attainted of treason or felony, with the consent of the husband, her copyhold will be forfeited;(z) so, if she commits waste with the like consent, it will be a forfeiture;(a) but a lease by the husband for more years than is warranted by the custom will be a forfeiture only for the life of the husband;(b) but denying to pay the rent or to do suit at court are present forfeitures, which shall bind the wife;(b) so, doing waste by the husband is a forfeiture, which shall bind the wife.(b)

884. An infant above the age of fourteen committing treason, felony, or voluntary waste, or other act to the disherison of the lord, or wilfully refusing his services, shall forfeit his copyhold;(c) but for permissive waste, or replevying against the lord, or for leasing contrary to the custom, [*687] *or the like, he shall not be liable to forfeiture;(d) but if the infant accepts rent after full age, and so confirms a lease, the forfeiture will bind him;(d) but it appears very doubtful whether the lord would be justified in entering as for a forfeiture in such a case.(e)

3. Who may take Advantage of a Forfeiture.

885. A forfeiture can only be taken advantage of by him who is lord at the time of the forfeiture; except in those cases where the act of forfeiture destroys the estate, as by fine or feoffment;(f) but a distinction has been taken between things which are forfeitures at the election of the lord, as leasing without license, waste, and the like, of which the lord only can take advantage, and those which go to the disherison of the lord by destroying his estate, as by feoffment, and formerly a fine;(f) therefore, if a copyholder commit a forfeiture, and the lord die before entry or seizure for the forfeiture, he in reversion or remainder shall not take advantage of the forfeiture committed before his time;(g) but if the copyholder of a manor belonging to a bishopric during a vacancy commit a forfeiture by cutting timber, the succeeding bishop may take advantage of it;(h) but see further as to seizure, *quousque*, post, § 902; so, a lessee for years of a manor shall

(y) *Tarrant v. Hellier*, 3 T. R. 162.

(z) 4 Bl., c. 29; 2 Watk. Cop. 333; citing 1 H. P. C. c. 1, s. 11.

(a) Co. Cop., s. 59, tr. 137.

(b) *Hedd v. Chalener*, 1 Bro. El. 149.

(c) 8 Co. 44; 1 Watk. Cop. 337, 338.

(d) Co. Cop., s. 59, tr. 137; *Ashfield v. Ashfield*, Noy, 92; S. C., W. Jo. 157; S. C., Godb. 364; S. C., Latch, 199.

(e) *Zouch v. Parsons*, 3 Burr. 1794; *Gilb. Ten.* 293, 294.

(f) *Tarrant v. Hellier*, 3 T. R. 162.

(g) *Lady Montague's case*, Cro. Jac. 301; S. C., 1 Bulst. 190; see also 1 Mod. 260; 1 Watk. Cop. 343.

(h) *Read v. Allen*, cited Bull. N. P. 108.

take advantage of a forfeiture committed by a copyholder, for he is *dominus pro tempore* ;(i) so, if the lord grant to a stranger the freehold of a copyhold in fee, though by this the tenement is divided from the manor, and not demisable by copy again, yet the grantee of the freehold shall take advantage of a forfeiture committed afterwards by the copyholder, *for he [*688] ought to pay his rent to the grantee ;(k) so, if the grantee make a lease for years of the freehold, the lessee shall take advantage of a forfeiture committed afterwards ;(l) but not of a forfeiture committed before the grant, for the grant of the freehold made by the lord before entry implies an assent that the copyholder shall continue his estate, and so is in nature of a confirmation.(m)

886. Even in the case of forfeiture for treason, the forfeiture accrues to the lord, and not to the queen, except by the express words of an Act of Parliament ;(n) but where a copyholder commits treason, and the lord aliens the manor, and afterwards the copyholder is attainted by Act of Parliament, it is not settled whether the alienee shall take advantage of the forfeiture.(n)

In one case where a copyhold manor descended on two coparceners, and copyholder committed waste, or made a lease, which were forfeitures, and after one of the sisters died, held, that the surviving coparcener should not take advantage of the forfeiture, for the election to take advantage of the forfeiture must be made by them both, which could not be after the death of one of them.(o)

4. *Extent of the Forfeiture.*

887. Where a copyhold is holden by one tenure, it is said that forfeiture of a part is a forfeiture of the whole ;(p) *sed secus*, if a copyholder be seised of several copies, as Blackacre by the rent of 3*d.*, and of Whiteacre by the rent of 4*d.*, and of Greenacre by the rent of 6*d.*, and one of the acres is [*689] *forfeited, this shall be no forfeiture of the other ;(q) so, if the copyholder holding three several acres, surrender to the use of A., *tenend' per antiqua servitia inde prius debita et de jure consuetâ*, and A. afterwards commits waste in one acre, that acre only shall be forfeited ;(r) so, if several copyholds escheat to the lord, and he commits a forfeiture in part of one, that one only shall be forfeited ;(s) for the several *habendums* and *tenendums* make them several in themselves, although they be all by one copy ;(s) so, where there are joint-tenants copyholders, and one commits a forfeiture, it shall extend to his part only, see ante, § 882. As to dispensing with a forfeiture, and how a forfeiture is to be taken advantage of, see infra, §§ 888, 889 et seq.

(i) 1 Roll. Abr. 509 ; 2 Saund. 422.

(k) East v. Harding, 2 Cro. El. 499 ; S. C., Moor, 392 ; see also Ow. 63 ; 1 Lutw. 802 ; Gilb. Ten. 209. 244.

(l) Ib. ; see also 1 Roll. Abr. 510.

(m) Ow. 63 ; see also Latch, 227 ; Palm. 416.

(n) 2 Vent. 39 ; see also Hard. 434.

(o) Eastcourt v. Weeks, 1 Salk. 186 ; S. C., Anon., 1 Freem. 516.

(p) Traverner and Cromwell, 4 Co. 27.

(q) Traverner and Cromwell, 4 Co. 27 ; see also 1 Roll. Abr. 509.

(r) Traverner and Cromwell, 4 Co. 28.

(s) Ib. ; see also S. C., 1 Cro. El. 353 ; S. C., 3 Leon. 109 ; see 2 Ld. Raym. 1000 ; Gilb. Ten. 246.

5. *Dispensing with a Forfeiture.*

888. Forfeitures being deemed odious in the law, the Courts have always inclined to construe every act of the lord as indicating an intention of dispensing with or waiving the forfeiture; therefore, if the tenant appear not in court, and the lord, after personal warning, amerce him, this is a dispensation of the forfeiture; *(t)* so, although it is not estreated or levied; *(u)* so, the acceptance of rent after a lease made is a dispensation; *(x)* so, the accepting of any services; *(y)* so, the re-admission of the copyholder who has committed the forfeiture; *(z)* so, by the admittance of the heir; *(a)* and so, even by the presentment of the death of the party committing the forfeiture, *Tarrant v. Hellier*, *(b)* where it is said, "Not only *admission of the copyholder or his heir, but any recognition on the part [**690*] of the lord, would preclude him from taking advantage of a forfeiture;" *(c)* so, if copyholder lets by indenture, which is forfeiture, and after surrenders to the use of J. S., and he is admitted, the lord after shall not take advantage of the forfeiture; *(d)* and in *Penn v. Merivall*, *(e)* it was held that a grant of the freehold before entry for a forfeiture by leasing without license was an affirmation of the lease.

So, if the lord do not enter for a forfeiture by reason of waste, and the tenant repairs, held, that the forfeiture was purged; *(f)* so, although trees that were cut down for repairs were not used until five years after; *(f)* so, it is said, that if a copyholder who comes to his estate tortiously commit a forfeiture, and then he that hath right release to him, that is a dispensation of the forfeiture, *sed quære*. *(g)*

889. So, an act by a lord *pro tempore*, which amounts to a dispensation, will bind those entitled to the manor in remainder or reversion, but not so as to give effect to a grant of a common law interest; *(h)* but a lord by wrong, as by disseisin, cannot do any act of dispensation to bind the rightful lord. *(h)*

890. So, the forfeiture must be known to the lord, otherwise any act by him amounting to a dispensation will not be deemed as such, *Co. Cop.*, s. 61, tr. 140; but see *Mantle v. Wollington*, *(i)* where this matter was left

(t) 1 Brownl. 149.

(u) *Braunche's case*, 1 Leon. 104; see also *Freem.* 517.

(x) 1 Keb. 15.

(y) *Co. Cop.* s. 61, tr. 140; *Bacon v. Thurley*, *Toth.* 107; *Hamlen v. Hamlen*, 1 Bulstr. 189; *Eastcourt v. Weeks*, 1 Salk. 186; *Freem.* 517; *Garrard v. Lister*, 1 Keb. 15.

(z) *Clerk v. Wentworth*, *Toth.* 107; *Milfax v. Baker*, 1 Lev. 26; *S. C. nom. Munifax v. Baker*, 1 Keb. 26; *S. C. Winch*, 67; *Page v. Smith*, *Holt*, 101.

(a) *Clerk v. Wentworth*, *sup.*; but see *Smith v. —*, cited *Toth.* 107.

(b) 3 T. R. 171.

(c) *Per Lord Kenyon*, C. J., *Tarrant v. Hellier*, 3 T. R. 171.

(d) *Kitch.* 177.

(e) *Ow.* 63.

(f) 2 Sid. 8.

(g) *Gilb. Ten.* 248; 1 *Watk. Cop.* 337.

(h) *Milfax v. Baker*, 1 Lev. 26; *S. C. nom. Munifax v. Baker*, 1 Keb. 26; *S. C. Winch*, 67; see also *Holt*, 161; 3 *Salk.* 100.

(i) *Cro. Jac.* 166; *S. C. nom. Mantell v. Weckington*, 1 *Roll. Abr.* 475.

unsettled; and Wheeler's case,^(k) where a widow entitled to free bench during chaste viduity was admitted by the lord after incontinency, but of which he had notice, and the lord was held to *be bound by the admission, see also 2 Danv. 207; Gilb. Ten. 247; and the lord will be presumed to have notice of non-attendance at court, non-payment of rent, and the like;^(l) so, although a lease contrary to the custom and without license, and all such other acts as do not tend to the destruction of the copyhold interest, such as waste, subtraction of suit and services, may be dispensed with, even by a lord *pro tempore*;^(m) but where the act tends to the absolute annihilation of the copyhold, as a feoffment with livery or an attainder, the copyhold interest is gone, and cannot be affirmed, it can only be revived by a new grant.⁽ⁿ⁾

6. How Forfeiture may be taken Advantage of.

891. In order to remove the estate out of the copyholder and vest it in the lord, the lands forfeited must be seized by the lord or his steward, either by the entry of himself or his steward,^(o) so, as he makes the entry within twenty years after the commission of the forfeiture;^(p) or by the exercise of some act of ownership tantamount to such seizure, as the granting them to another for years, or the like.^(q)

892. Seizure by entry may be either immediately upon the commission of the act of forfeiture, or it may be made after presentment by the homage. When the act of forfeiture is of a public nature, as attainder for treason or felony, which is notorious from the publicity of conviction and the attainder on record, or refusing in open court to do suit or service, &c., or other matter which must necessarily be within the lord's knowledge, and is not of a dubious *character, so as to admit of a double construction, no [*692] presentment will be necessary, because the reason of the presentment is to give the lord notice of the forfeiture.^(r)

893. But where the act of forfeiture is of such a nature that the lord cannot be supposed to have knowledge of it without express notice being given him, or if it be of such a nature that either the fact of commission or the actual nature of the offence be questionable, the lord cannot, as it should seem, make a seizure until presentment of the cause of forfeiture be made by the homage;^(s) so, says my Lord Coke, "The offences and causes of forfeiture of which by common presumption the lord cannot of himself have notice, are felony or treason, outlawry or excommunication, going about in any other court to entitle any other lord to the copyhold, and alienation by

(k) 4 Leon. 240.

(l) Lord Cornwallis's case, 2 Vent. 39.

(m) Co. Cop., s. 61, tr. 140.

(n) Ib.; see also Bennison v. Strode, T. Jo. 189; S. C., 2 Show. 152; 1 Watk. Cop. 351.

(o) Benson and Strode, 2 Show. 152.

(p) Tarrant v. Hillier, 3 T. R. 172.

(q) Milfax v. Baker, 1 Lev. 26.

(r) Co. Cop., s. 58, tr. 135; Jowry and Pawly, 2 Keb. 451; Benson v. Strode, T. Jo. 190; S. C., 2 Show. 152; see also East v. Harding, 1 Cro. El. 499; Milfax v. Baker, 1 Lev. 26; Gilb. Ten. 247; 1 Watk. Cop. 346.

(s) Cornwallis's case, 2 Vent. 39.

bargain and sale enrolled, or by feoffment with livery, and these and the like ought to be presented; (*t*) but this point is not settled. It is said by a writer of authority, "The reason given by Coke is of no cogency, that because the lord cannot by intendment have notice of them himself, therefore he shall take no advantage of them without presentment; for if he can take notice of them, why should he not, since presentment is not that which gives title, but only lets him know what he hath title to. But, however, it is safe to get such things presented, and if there be a custom for it, it must be pursued;" (*u*) see also 1 Watk. Cop. 346, and the authorities above cited, (ante, § 892,) where presentment was held not to be necessary. However, although when a plaintiff makes title in the lessor or lord of a manor, who has right by forfeiture of a copyhold, neither a presentment of the forfeiture nor a seizure *by the lord need be proved; (*x*) yet it is essential to establish the fact of forfeiture by the clearest evidence. (*y*) [*693]

III. Enfranchisement of Copyholds.

§ 894. Definition of Enfranchisement.	598. Effect of Inclosure.
Distinction between Enfranchisement and Extinguishment.	599. Effect of Enfranchisement. To Extinguish Common.
895. How effected.	590. To bar Entails.
896. By Conveyance of the Fee simple.	When made to a Trustee.
897. By Release.	Liability to repair.

§ 894. Another mode by which the copyhold interest may be destroyed or annihilated is by enfranchisement, which, as the term imports, is an emancipation of the land from its base tenure, or converting the same from a copyhold into a freehold tenure. There is a clear distinction between enfranchisement and extinguishment, for enfranchisement destroys the tenure, so that the lands become absolutely free, and extinguishment destroys only the estate of the copyholder, which may be revived in the same or another person by a new grant.

895. An enfranchisement is effected by a common-law conveyance of the fee simple of the particular tenement, by the lord of the manor to the copyholder, for it is by the union of the freehold and copyhold interest, that the base or less worthy tenure becomes lost in the more worthy; (*z*) therefore, it is immaterial whether it be immediately from the lord, or first to a stranger, and such stranger convey to the copyholder, for in either case it will be an enfranchisement on the union of the tenures; (*z*) so, a person who has been *admitted and recognized as the lord's tenant, although in strictness he should have an equitable interest only, is [*694] capable of receiving a grant of the freehold, for giving effect to a contract of enfranchisement, and the heir may accept an enfranchisement before admis-

(*t*) Co. Cop., s. 58, tr. 135.

(*x*) In re Winton, (Bishop), Bull. N. P. 107.

(*y*) Hamlen v. Hamlen, 1 Bulst. 190.

(*u*) Gilb. Ten. 246.

(*z*) Lane's case, 2 Co. 16.

sion ;(a) but it seems that if a copyholder be enfeoffed by the lord to the use of others, the copyhold interest will still remain under the Stat. of Uses, (27 H. 8, c. 10, s. 3.)(b)

896. In order to make an enfranchisement absolute and entire, the fee simple of the freehold must be conveyed, for if a less estate than the fee be conveyed, the union, though complete for the time, can last no longer than during the continuance of the interest conveyed, after which the land may again be granted to be holden by copy ; therefore where the husband of a lady of the manor let a copyhold parcel of the manor for years by indenture, held, that this did not destroy the custom of the manor, but that the wife, after his death might demise it again by copy ;(c) this, therefore, will operate only as a temporary suspension of the copyhold interest, and not as an enfranchisement.(c) But a copyholder having but a partial interest, as an estate for life, &c., his taking such a conveyance of the fee will not prevent the enfranchisement from being complete ; because, although the copyhold interest as to him can be for no longer time than he has therein, yet the grant of the freehold in the fee simple by the lord renders the land for ever incapable of being holden of him by copy, since his whole estate is gone by the grant in fee simple, and such a conveyance operates as a total extinction of the demisable quality of the land ; the enfranchisement, however, in this case is not for the benefit of the party himself only, but of all [*695] those who would have been entitled to the copyhold *after the determination of the particular estate, and will not pass a fee simple to the particular tenant, whose heir-at-law will, therefore, be compellable to execute a conveyance to the remainder-man, on his paying a proportionate part of the consideration, if any, paid for the enfranchisement.(d)

By the Land Tax Redemption Act, (42 G. 3, c. 116,) persons having a particular interest only are empowered to enfranchise copyholds, and a conveyance by them is made to operate as a complete enfranchisement. There is a like provision in the Church Building Act, (58 G. 3, c. 45 ;) and by the 10 G. 4, c. 50, the Commissioners of Woods and Forests are empowered to enfranchise copyhold land held of the Crown, and the deeds of enfranchisement are to be inrolled.

897. An enfranchisement may likewise be effected by the lord's releasing to the copyholder the manorial rights, for by this the lands are severed from the manor, and the tenure between the lord and his tenant dissolved, and he must thenceforth hold of the lord above by the same services as the releasor held before.(e) The lands, therefore, being thus by enfranchisement severed from the manor, it follows that all customs which attached upon them, whilst holden of the manor, as a particular mode of descent or the like, are lost, and they acquire all the properties and qualities of freehold tenures, and so also will all rights and privileges annexed to the copyholder's estate, as rights of common or the like, be of course extinguished as soon as the copyhold to which they were annexed is gone ; if, therefore, it be intended that these

(a) *Wilson v. Allen*, 1 Jac. & W. 611.

(b) *Iscd's case*, cited 7 Co. 38 a.

(c) *Conesbie v. Ruskey*, 2 Cro. El. 459.

(d) *Winne v. Cookes*, 1 B. C. C. 515 ; see also *Challoner v. Murhall*, 2 Ves. jun. 524.

(e) *Litt.*, s. 147 ; 1 Inst. 102, b.

rights should be preserved, an express grant of them to the grantee of the land must be inserted in the deed of enfranchisement,^(f) see further, *infra*, § 899.

*890. When an allotment is made to a copyholder, of waste or other freehold land, under an Act of Parliament, not containing an [*696] express provision that the allotted land shall be held by the same tenure as the estate in respect whereof the allotment is made, no change of tenure will take place in the land so allotted; therefore, where allotments were made and awarded to a copyholder, in respect of several customary estates of which he was seised in fee according to the custom of the manor, according to an agreement between the lord of the manor and the commoners, which was confirmed by an enclosure act, held that the allotments so made were freehold, not customary estate, and therefore were not within the custom of the manor, that customary estates were not deviseable by will, *Lowes v. Davidson*; ^(g) and it was in this case assumed as incontrovertible, that a copyhold could not be created at this day except by Act of Parliament, or by custom to warrant the granting of the waste as copyhold; and as the act did not direct the allottees to take their allotments as copyholders, they took their allotments as freehold estates of inheritance, it not being competent to the parties, by any agreement among themselves, to constitute an estate of a customary nature in these allotments.^(h)

899. One consequence of enfranchisement is, that where a copyholder has common in the wastes within the manor that belongs to his estate, if the estate be enfranchised, the common is extinct,⁽ⁱ⁾ unless it be specially preserved to the copyholder in terms equivalent to a re-grant of common;^(k) and the grant of "all appurtenances" to the copyhold tenement has been held not sufficient to preserve the common; *but though this right is destroyed at law by enfranchisement, it will subsist in equity;^(l) [*697] so, if a man has common in the wastes of the lord out of the manor, he has the same as belonging to his land; and if he enfranchises the copyhold estate, still his common remains;^(m) so, if a copyholder has immemorially enjoyed a right of way over another's copyhold, and he become the purchaser of the freehold of his own copyhold, yet the way remains,⁽ⁿ⁾ for as between the copyholder and a stranger it is the tenure only that is altered by the enfranchisement.^(o)

^(f) *Fort and Ward, Moor*, 667; see also *Bradshaw v. Eyr*, 2 Cro. El. 570; *Wortledg v. Kingswel*, Id. 794; S. C., 2 Anders. 168; *Marshall v. Hunter*, Cro. Jac. 253; S. C., 1 Bulst. 2; S. C. nom. *Massam v. Hunter*, Yelv. 189; S. C. nom. *Darson v. Hunter*, Noy, 136; S. C. nom. *Massam v. Hunt*, 1 Brownl. 22; *Grymes v. Peacock*, 1 Bulst. 18; *Crowther v. Oldfield*, 1 Salk. 366.

^(g) 2 M. & S. 175.

^(x) *In re Winton (Bishop)*, Bull. N. P. 107. ^(z) *Hamlen v. Hamlen*, 1 Bulst. 190.

^(h) *Lowes v. Davidson*, 2 M. & S. 175; see also *Revell v. Joddrell*, 2 T. R. 415; *Townley v. Gibson*, 2 T. R. 701.

⁽ⁱ⁾ *Crowder v. Oldfield*, 1 Salk. 170; S. C. Holt, 146; S. C., 6 Mod. 19.

^(k) *Speaker v. Styant*, Comb. 127.

^(l) *Styant v. Staker*, 2 Vern. 250.

^(m) *Ib.*; see also *Hob. 86*; *Cro. Jac. 253*; *Yelv. 189* et seq.

⁽ⁿ⁾ 1 Roll. Abr. 933.

^(o) *Rich v. Parker*, *Hardw. 131*.

900. If a copyhold estate be enfranchised by a tenant in tail, the issue in tail will be barred.(p)

The conveyance by way of enfranchisement should always be taken in the name of the copyholder, and not in the name of a trustee, for in this latter case the copyhold interest would still remain, so that the wife of the copyholder, if dowable by the custom, would still remain so,(q) and the heir is entitled to recover in ejectment against the purchaser of the freehold interest.(r)

Enfranchisement only alters the manner of the tenure; therefore, where the lord is bound to repair a way *ratione tenuræ*, the ancient freehold and copyhold tenants are not liable to contribute, for nothing is part of the manor but demesnes and services, and not the lands of the tenants; and though the copyholds are afterwards enfranchised, yet they are not chargeable, because it only alters the manner of the tenure.(s)

[*698] *VI. Injuries relative to Copyholds, and their Remedies.

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| <p>§ 901. Injuries affecting Lord or Tenant.</p> <p>902. Remedies for the Lord.
Seizure.
What Lord may seize quousque.</p> <p>903. Other Remedies.
In what Courts.</p> <p>904. Remedies for the Tenant.</p> <p>905. Ejectment.</p> <p>906. Trespass.</p> <p>907. Remedies for Commoners.</p> <p>908. Mandamus.
To compel Admittance of Customary Heir.</p> <p>909. To hold a Court.
To compel Acceptance of Surrender.</p> | <p>§ 910. To inspect Court Rolls.
To enrol Surrender.</p> <p>911. Actions by Copyholders.
In what Courts.</p> <p>912. Personal Actions.</p> <p>913. Aid of Courts of Equity.</p> <p>914. To produce the Court Rolls.</p> <p>915. To discover Boundaries.</p> <p>916. In Cases of Forfeiture.
To restrain Waste.</p> <p>917. In case of doubtful Rights.
Bills of Peace.
To avoid Multiplicity of Suits.</p> <p>918. In Cases of Fraud.
In Cases of Irregularity in Lord's Court.</p> |
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§ 901. The injuries relating to copyholds are those which affect either the lord or the tenant. Of the former kind are subtraction of services, committing waste, and others which cause a forfeiture, see ante, § 872, also post, INJURIES TO THINGS REAL. Those which affect the tenant are ouster, or what is equivalent to it, refusing to admit a tenant, and abridging a tenant of his rights of common.

902. The remedies for the lord are entry and seizure, ejectment, and case.

(p) Parker v. Turner, 1 Vern. 393, 458; S. C. nom. Barker v. Turner, 2 Chan. C. 174; see also Challoner v. Murhall, 2 Ves. jun. 524; and 4 East, 283.

(q) Howard v. Bartlet, Hob. 181; S. C. nom. Waller v. Bartlett, 2 Roll. Rep. 178; S. C. nom. Waldoe v. Bertlet, Cro. Jac. 572; S. C. nom. Waldor and Barkley's case, Palm. 111; see also Murrel v. Smith, 4 Co. 24; Lashmer v. Avery, Cro. Jac. 126.

(r) Dancer v. Evett, 2 Vern. 250.

(s) Rich v. Barker, Hardr. 131.

Seizure by entry is the remedy in cases of forfeiture, but the lord of a manor may, in some cases, only seize *quousque*, and not absolutely as for a forfeiture; thus, after three proclamations for the tenant to come in and be admitted, if the tenant fail to attend, the lord may seize *quousque*; as where the heir was beyond seas at the time of the ancestor's death, held, that the lord had a right to seize in the interim, though *he could not seize absolutely as forfeited;(t) so, although a *feme covert* is [*699] protected from forfeiture by the statute 11 G. 4 & 1 W. 4, c. 65, (Dig. P. ii. tit. Courts,) yet the lord may enter in the meantime; so, where one saying he would come if the lord had a court, otherwise not, held, not to be a forfeiture, but the lord on such refusal might seize *quousque*;(u) and the lord of a manor cannot seize a copyhold estate as forfeited *pro defectu tenentis* without a custom; therefore, where, on the death of a copyholder of inheritance, the lord, after three proclamations for the heir to come in and be admitted, seized the estate into his hands, and afterwards granted it to another, the Court considered it as an absolute seizure, and consequently irregular, there being no custom to warrant it, and being irregular as an absolute seizure, it could not afterwards be set up as a seizure *quousque*;(v) so, if the lord do not take advantage of the forfeiture within twenty years, his right is said to be barred;(v) see further, as to the dispensing with a forfeiture, ante, §§ 888 et seq., and as to the taking advantage of a forfeiture, ante, §§ 892 et seq.

A lord may, however, seize copyhold land *quousque* by virtue of a right which accrued to the preceding lord, on default of the heirs coming in to be admitted, even although he be the devisee and not the heir of the preceding lord;(x) but to entitle the lord to make such seizure, there must be three proclamations made at three consecutive courts, *Bover v. Trueman*;(y) and in this case it was said, "The seizure is rather in the nature of a process at the instance of the lord, by way of *cape* or *distringas*, to compel an appearance by the heir, than a forfeiture."(z) In a subsequent rehearing of *this case it was said, that the proclamations at the lord's court are substituted for the notice which ought to be given to the heir if [*700] known that the tenancy is vacant. The proceeding bears some analogy to proceedings in outlawry to compel a party to appear in court to answer the complaint of another.(a)

903. For denying of services the lord may either seize or distrain, as in the case of rents, fines, reliefs, or heriots, see ante, §§ 802, 815; or for non-

(t) *Underhill v. Kelsey*, Cro. Jac. 226.

(u) *Cocke v. Lees*, cited in 1 Keb. 287.

(v) *Tarrant v. Hillier*, 3 T. R. 170.

(x) *Bover v. Trueman*, 1 B. & Ad. 736.^a

(y) 1 B. & Ad. 736.^a

(z) Per Bayley, J., *Bover v. Trueman*, 1 B. & Ad. 746; see also *Lechford's case*, 8 Co. 99 a; *Baspool v. Long*, 2 Cro. El. 879; S. C., Yelv. 1; Noy, 42; *Underhill v. Kelsey*, Cro. Jac. 226; S. C., Godb. 263; *Rumney v. Eves*, 1 Leon. 128; *Anderson v. Hayward*, 3 Leon. 321; S. C., 4 Leon. 40; *King v. Delliston*, 1 Carth. 41; S. C., 1 Salk. 386; 1 Lutw. 765; 3 Mod. 221; 1 Show. 31. 84; *Ashton v. Hutton*, 2 Wils. 162; *Whitbread v. Jenny*, 5 East, 522; *Gilb. Ten.* 230, *Watk. ed.* (N) 100; 1 *Watk. Cop.* 231, all cited and recognized as authorities on the subject of the three proclamations necessary to be made.

(a) Per Lord Tenterden, C. S., *Bover v. Trueman*, 1 B. & Ad. 746.^a

attendance at court may amerce, see ante, § 888. So, the lord of the manor may plead or be impleaded, or avow for the rent or services of his copyhold tenant in any court of equity, for he hath an estate at common law in the rent, and it is due to him on the same grounds in law as the rents of freehold lands, for otherwise he would be both judge and party,^(b) see further, as to relief in equity, infra, § 913.

904. A copyholder may have either an action of ejectment, of trespass, or on the case, either against a stranger or against the lord, according to the circumstances, and also in some cases a *mandamus*, and may also in some instances have relief in equity, see infra, § 913.

905. It has long been settled, that a copyholder may try his title in an action of ejectment, and accordingly the lessee of a copyhold for one year may maintain ejectment, inasmuch as his term is warranted by law, and it [701] is a speedy course to recover the possession of land against a stranger;^(c) *and as a copyholder cannot demise beyond a year without a license, unless by special custom, it has been thought that he ought in such case to allege the custom, or shew the license;^(d) it has, however, been held, that if a copyholder make a lease, even though not warranted by the custom, yet it shall be good so as to maintain an ejectment against a stranger, for as between the lessor and the lessee, and all others, except the lord of the manor, such a lease is good, Downingham's case;^(e) see also S. P., *Streat v. Virrall*,^(g) *Peter's case*;^(h) also *Goodwin v. Longhurst*,⁽ⁱ⁾ *Collins v. Harding*,^(k) *Homes and Bingley*,^(l) *Sloper v. Gibson*,^(m) *Rumney and Eve's case*,⁽ⁿ⁾ in all which cases the same doctrine is laid down; so, in *Petty v. Evans*,^(o) held, that in an ejectment by the lessee of the copyholder, it is sufficient that the count be general, without any mention of the license; and on the other hand, in *Anderson and Heywood's case*,^(p) it was holden, that a copyholder of inheritance of a manor in the hands of the king, and who was ousted of his copyhold, had not gained any estate, so as he might make a lease for years, upon which to maintain an ejectment, but that he had a possession only against all strangers, and see *Nelson v. Kenington*;^(q) it is, however, settled, that no ejectment can be maintained by a copyholder, except under a lease

(b) Salk. 186, pl. 5; see also *Dench v. Bampton*, 4 Ves. 700.

(c) *Melwich and Luter*, 4 Co. 26; S. C., 1 Cro. El. 102; see also Co. Cop., s. 51, tr. 119; *Cole v. Wall*, 1 Cro. El. 224; S. C. nom. *Cole v. Wallis*, 1 Leon. 328; S. P., *Spark's case*, 2 Cro. El. 676; S. C. nom. *Sprake's case*, Moor, 569; S. P., *Frosel v. Welch*, Cro. Jac. 403; Anon., Godb. 268; *Gilb. Ten.* 213, but see contra, *Stephens v. Eliot*, 2 Cro. El. 484.

(d) *Wells v. Partridge*, 1 Cro. El. 469; see also *Cramporn v. Freshwater*, Brownl. 133; *Ever v. Aston*, Moor, 272; S. C. nom. *Ewer v. Astwike*, 1 Anders. 193; *Gregory v. Harrison*, Moor, 679; Supp. Co. Cop., s. 20; *Rumney v. Eve*, 1 Leon. 128; *Gilb. Ten.* 436, (N. 92.)

(e) *Ow.* 17, 18.

(h) Cited Godb. 365.

(k) 2 Cro. El. 623.

(m) Moor, 100.

(o) 2 Brownl. 40.

(q) *Clayt.* 1.

(g) Cited Cro. Car. 304.

(i) 1 Cro. El. 535.

(l) *Sty.* 380.

(n) 1 Leon. 100.

(p) 3 Leon. 221; S. C., 4 Leon. 230.

at common law ;(r) see further, as to evidence and other matters in ejectment, post, under the head of INJURIES TO THINGS REAL AND THEIR REMEDIES.

*794. So, a copyholder shall have trespass by the common law, for a trespass done upon his copyhold ;(s) so, he shall have it against his lord if he enters upon him without cause,(t) or if he cuts down trees not being timber ;(u) but see *Ashinond, or Ashmead, v. Ranger*,(x) where the Lords, by a majority of one, reversed the decision of all the judges of the realm. [*702]

The customary heir of a copyholder being a complete tenant before admittance, against all persons but the lord may maintain trespass and bring ejectment, without having been admitted ;(y) so, if the surrenderee be in possession, he may maintain trespass before admittance, that being a possessory action, but before his admittance trespass can only be maintained by the surrenderer.(z)

907. In the case of common, the injuries which affect the copyholder are, disseisin of his common, or disturbance by the lord or other commoners, or by strangers intruding on the waste. As against the lord, even in the case of a total exclusion, the copyholder may abate the nuisance, see ante, § 324 ; but in other cases he may have an action on the case,(z) and as against strangers he may have his remedy by distress, see ante, § 325.

908. Copyholders may also have a *mandamus* in certain cases, as, where the lord refuses to admit a tenant, a *mandamus* will lie, *Roe v. Griffiths*,(a) where it is said, "The admittance is only form. 'Tis a ceremony derived from the origin of copyholds ; but the lord's act is mere form, he is a mere instrument, and compellable to admit according to the surrender :"(b) and although it was at one time doubted *whether this writ would lie to compel the admittance of a party claiming by descent, because he has a complete title against all the world except the lord,(c) yet it was said in *R. v. Coggan*,(d) that the courts had for many years been in the habit of granting such writs, and their power of so doing could not be doubted ; see also *Conolly v. Vernon*,(e) *R. v. Stafford*, (Marquess)(f) *R. v. Water Eaton*,(g) *R. v. Willes*,(h) *R. v. Brewers' Company*,(i) *R. v. Bonsall*, (Lords, &c.)(k) *R. v. Wilson*, (Lord, &c.)(l) [*703]

(r) *Spark's case*, Cro. El. 676 ; *Cole v. Wallis*, 1 Leon. 328 ; S. C. nom. *Sprake's case Moor*, 569.

(s) 2 H. 4, 12 a ; 7 Ed. 4, 19 a.

(t) Litt., s. 77 ; 1 Inst. 60, b.

(u) 1 Leon. 272, pl. 365.

(x) Ante, § 850.

(y) *Brown's case*, 4 Co. 22 ; Co. Cop., s. 41, tr. 94 ; *Kitch*, 119.

(z) *Berry v. Greene*, 1 Cro. El. 349.

(a) 3 Burr. 1961.

(b) Per Lord Mansfield, C. J., *Roe v. Griffiths*, 3 Burr. 1961.

(c) *R. v. Rennett*, 2 T. R. 198 ; see also *Williams v. Lord Lansdale*, 3 Ves. 752, 754.

(d) 6 East, 431 ; S. C., 2 Smith, 417.

(e) 5 East, 51 ; S. C., 1 Smith, 318

(f) 7 East, 521 ; S. C., 3 Smith, 459.

(g) 2 Smith, 54.

(h) 3 B. & A. 510.^e

(i) 3 B. & C. 172 ; S. C., 4 D. & R. 492.

(k) 3 B. & C. 173 ; S. C., 4 D. & R. 825.

(l) 10 B. & C. 80.^s

^eEng. Com. Law Repts. v. 361. ^fId. x. 47. ^sId. xxi. 29.

909. So, a *mandamus* will be granted in other matters affecting customary estates, as for the purpose of compelling the lord of a manor, or his steward, to hold a court, and the homage to present certain conveyances of burgage tenements, entitling the purchasers to be sworn in burgesses of the corporation, and to vote for members of Parliament. *(m)*

So, to compel the acceptance of a surrender, and to admit the surrenderee, *R. v. Boughey* (Lord, &c.) *(n)* where the return stated a custom that if any person, not being before a customary tenant or not dwelling within the manor, should take any estate as a purchaser, by surrender or otherwise, of any customary tenant within the manor, he should pay an arbitrary fine, but that persons being customary tenants paid another and smaller fine, and it further stated, that B. having purchased the equity of redemption of a customary estate of considerable value, afterwards and before he was admitted thereto purchased the land in question, being a small customary [*704] estate, in order to be admitted to that first, and alleged this to be *a fraud upon the lord, the Court held, that B. might lawfully make such second purchase in order to avail himself of the custom in favour of tenants of the manor; and it is there added, "Even admitting that the second purchase were fraudulent, it is by no means clear that the return would be sufficient;" *(o)* though, in that case, the Court inclined to think, that the party would not have been entitled to the assistance of this prerogative writ. *(o)*

910. So, the lord is compellable by this writ to permit the court rolls to be inspected by any person claiming an interest under them; and it was granted to one who had a *prima facie* title to certain copyhold lands; *(p)* and it will be granted as of course on the application of a tenant; *(q)* and it is not necessary that there should be any suit depending; *(r)* but, in *R. v. Allgood*, *(s)* the Court held, that a freehold tenant had no right to inspect the court rolls unless there were some cause depending in which his title might be involved.

So, a *mandamus* might lie against the lord, or his steward, to compel the enrolment of a surrender, and it was refused in one case only because the surrender had not been prepared by the steward or his deputy. *(t)*

911. A copyholder must, in every action real, implead and be impleaded in respect of his copyhold land in the court of the manor of which it is holden, for he cannot implead or be impleaded in such case by the queen's writ; *(u)* and therefore, before the 3 & 4 W. 4, c. 27, abolishing most real actions, or complaints in the nature thereof, (see Dig. P. iii. tit. Limitations,) if

(m) *R. v. Medhurst*, (Borough) 1 Wils. 283.

(n) 1 B. & C. 565; S. C. nom. *R. v. Mier and Forton*, (Manor, &c.) 2 D. & R. 824.

(o) Per Bayley, J., *R. v. Boughey*, (Lord) &c.) 1 B. & C. 565; S. C. nom. *R. v. Mier and Forton*, (Manor, &c.) 2 D. & R. 824.

(p) *R. v. Lucas*, 10 East, 235.

(q) *R. v. Shelly*, 3 T. R. 141.

(r) *R. v. Tower*, 4 M. & S. 162; see also *Freeman v. Phillips*, Id. 486; *Bateman v. Phillips*, 4 Taunt. 162; *Rogers v. Jones*, 5 D. & R. 484.

(s) 7 T. R. 746.

(t) *R. v. Rigge*, 2 B. & A. 550.

(u) Litt., s. 76.

he impleaded another for his tenements, *he should have a plaint in the lord's court, and make protestation to sue in the nature of an [*705] assize of *novel disseisin*, &c.;(v) and if an erroneous judgment were given, he should not have a writ of false judgment in respect of the baseness of his estate, but he must have sued to the lord by petition;(x) but a copyholder might have the action of ejectment, which is now the only proper action retained for trying titles to land, see ante, § 905.

912. Actions merely personal, the copyholder may sue at common law;(y) so, a copyholder may have case against the lord, or a stranger, for an injury done to the common belonging to his copyhold;(z) but if lessee for years of a copyholder cuts down the trees, the copyholder shall sue in the lord's court to punish this offence;(z) so, if a copyholder surrenders to the use of B., upon trust that he shall hold the land until he hath levied certain money, and that after he shall surrender to the use of C., the money is levied, and B. is required to make a surrender to the use of C., and refuses, upon C. exhibiting his bill to the lord of the manor against B., if B. persists in his refusal, the lord may seize and admit C. to the copyhold, for in such case he is chancellor in his own court,(a) and he may do right according to conscience;(b) so, if a surrender be made to the use of another, without expressing what estate he shall have, a custom, that the lord may grant it in fee to him for whose use the surrender was made, is good.(c)

913. If the lord refuses admittance to the heir or surrenderee, the copyholder may sue in Chancery, and will be there relieved;(d) but a Court of equity will not compel the *lord to admit a person who does not shew a colourable title, and that there is a reasonable prospect of succeeding at law.(e) [*706]

914. So, a court of equity will also make an order on the lord or steward to produce the court-roll for the inspection of any one claiming an interest under them;(f) and although a Court of law, in a question between the lords of different manors, will not enforce an inspection of the court-rolls, yet a Court of equity will do so on a bill for a discovery;(g) but the Court refused to interfere upon a petition to have court-rolls delivered by a steward appointed by trustees to a steward appointed by a testamentary guardian, there being no suggestion of improper conduct, or advantage from the change.(h)

915. So, a Court of equity will entertain a bill by the lord of a manor to

(v) Litt., s. 76.

(x) 1 Inst. 64, a; F. N. B. 12, B.

(y) Co. Cop., s. 143.

(z) 2 Leon. 201; 2 Brownl. 146; 1 Roll. Abr. 106.

(a) Borneford and Packington's case, 1 Leon. 1.

(b) Ow. 63.

(c) Brown v. Foster, Cro. El. 392.

(d) Westwick v. Wyer, 4 Co. 28 b; Ford v. Hoskins, Cro. Jac. 363; S. C., 2 Bulstr. 336; S. C., 1 Roll. Rep.; see also Roswell's case, Dy. 264; Moor v. Huntington, Nels. 12; Lunsford v. Popham, Toth. 64; Towel v. Cornish, 2 Keb. 357; Noden v. Griffiths, 4 Burr. 1961; Atkins v. Atkins, 5 Burr. 2787; Gilb. Ten. 291.

(e) Widdowson v. Harrington (Earl), 1 Jac. & W. 543.

(f) Stacie's case, Latch, 182; Corbett v. Peshall, Toth. 109; Draper v. Zouch, Finch, 249; Langham v. Lawrence, Hardr. 180; Anon., 2 Vez. 578; see also Anon., Sty. 128.

(g) Anon. 2 Vez. 621.

(h) Mott v. Buxton, 7 Ves. 201.

discover the boundaries and description of lands, and for a commission to issue, if necessary, to distinguish freeholds from copyholds, where they are intermixed;(i) but this will be done only under special circumstances, *Bouverie v. Prentice*;(k) see also *Rouse v. Barker*,(l) *Wake v. Conyers*,(m) *Winterton v. Lord Egremont*,(n) *Spier v. Crawter*,(o) from which it appears that equity interferes to settle boundaries only when the soil itself has been in question, or to prevent a multiplicity of actions.(p)

[*707] *916. So, a Court of equity will, under special circumstances, grant relief against an act that is a forfeiture, as where waste has been inadvertently done,(q) or done by a stranger;(r) so, in cases of permissive waste, equity will generally give relief;(s) so, it has been relieved against a forfeiture, when timber on one copyhold has been cut down to be employed for the repair of another;(t) and in the case of cutting timber, it has directed an issue to try *quo animo* it was cut;(u) but it will not relieve against wilful waste, nor unless a compensation can be made to the lord;(x) so, where copyholders are allowed by the custom to cut down, it will grant an injunction to restrain waste in favour of the remainder-man, the same as in cases of freehold;(y) so, a customary heir of a copyholder taking by way of resulting trust until the happening of a contingency has been restrained from committing waste;(z) and although in *Dench v. Bampton*,(a) the Court refused to interpose to prevent waste, leaving the lord to his remedy for the forfeiture, and in a previous case it had been held, that a bill for discovery of waste was demurrable to,(b) yet, in *Richards v. Noble*,(c) a bill by the lord against the copyholders was entertained, for an account of turves cut and taken, and an injunction granted, not waiving the forfeiture, on the principle that the forfeiture is often a very inadequate remedy.

917. Where the right between the lord and tenant is doubtful, a Court of equity will interpose to prevent any assertion *of such right until it [*708] has been tried at law;(d) see ante, § 854. So, although one tenant cannot institute a suit on an excessive fine, yet, to avoid a multiplicity of suits, equity will entertain a suit by several for the same general purpose of being relieved against an excessive fine. So, a bill of peace may as well be brought by the lord against the tenants, as by the tenants against the lord;(e)

(i) *Leeds (Duke) v. Powell*, 1 Vez. 172; *Same v. Strafford (Earl)*, 4 Ves. 180.

(k) 1 B. C. C. 201. (l) 4 B. P. C. 660.

(m) 2 Cox, 362; S. C., 1 Eden, 331; S. C., cited as *Webb v. Conyers*, 1 B. C. C. 41.

(n) Cited 2 Anstr. 392. (o) 2 Mer. 418.

(p) *Ib.*; see also *Wintle v. Carpenter*, Finch, 462; *Ely (Bp.) v. Kenrick*, Bunb. 322; *Clayton v. Cookes*, 2 Atk. 450; *Norris v. Le Neve*, 3 Atk. 82; *Lethulier v. Castlemain*, Sel. Ca. temp. King, 60; S. C., 1 Dick. 46; *Lord Abergavenny v. Thomas*, 3 Anst. 668, n. (u); *Willis v. Parkinson*, 2 Meriv. 507.

(q) *Nash v. Derby*, 2 Vern. 537. (r) *Taylor v. Hooc*, Toth. 237.

(s) *Commin v. Kinsmell*, cited Toth. 108; *Thomas v. Porter*, 1 Chan. Ca. 95; S. C., 2 Freem. 137.

(t) *Nash v. Derby (Earl)*, sup. (u) *Thomas v. Porter*, 1 Chan. Ca. 95.

(x) *Peachy v. Somerset (Duke)*, Prec. Chan. 568; S. C., 1 Str. 447.

(y) *Cornish v. New*, Finch, 220. (z) *Stansfield v. Habbergham*, 10 Ves. 278.

(a) 4 Ves. 703.

(b) *Attorney-General v. Vincent*, Bunb. 192; *Lord Uxbridge v. Staveland*, 1 Vez. 56.

(c) 3 Mer. 673. (d) *Grey v. Northumberland (Duke)*, 13 Ves. 236.

(e) *Conyers v. Lord Abergavenny*, 1 Atk. 285.

and the Court has entertained such bills where the tenants have opposed the lord's improvements, under the Statute of Merton, see Dig. P. ii. tit. Commons; (*f*) and such bills may be entertained, although the parties have no greater estate than for life. (*g*)

So, on the same principle of avoiding a multiplicity of suits, tenants of a manor have been allowed to establish their rights to the profits of a fair. (*h*) So, compositions between lords and tenants have been held to bind a purchaser or heir; (*i*) but a decree against the lord of the manor will not bind copyholders who are no parties to the suit. (*k*)

918. Equity will interpose in cases of fraud as much when it concerns copyholds as freeholds, and will set aside conveyances for inadequacy of price. (*l*) So, a Court of equity will correct the proceedings in the lord's court, where any thing is done against conscience, though no appeal or error lies. (*m*) So, where copyholds have been surrendered absolutely, and without any condition, yet if it can be *shewn that the surrender was intended as a security only for the repayment of money, a Court of [*709] equity will decree a redemption against the surrenderee. (*n*) So, it will supply a surrender in case of any defect in the presentment, or the want of surrender, in favour of a younger child. (*o*) So, for a widow against a collateral heir; (*p*) but a want of surrender will not be supplied in favour of a grandchild, where the heir is not provided for; (*q*) but equity will, in some cases, to support the devise of a copyhold estate, supply the defect of a surrender, though the defective execution of a devise of a freehold estate will not be aided in equity. (*r*)

SECTION II.

OF PRIVILEGED COPYHOLDS.

§ 919. There are two kinds of copyhold tenure, which have been distinguished by the name of privileged copyholds: namely,—

1. Customary freehold.
2. Ancient demesne.

(*f*) *Arthington v. Fawkes*, 2 Vern. 356; S. C., 1 Eq. Ca. Abr. 103; *Filewood v. Palmer*, Mor. 169; *Hanson v. Gardiner*, 7 Ves. 305; *Powell v. Powis* (Earl), 1 Y. & J. 159.

(*g*) *Dunn v. Allen*, 1 Vern. 427; see also *Meadows v. Patherick*, Finch, 154.

(*h*) *New Elme Hospital v. Andover*, 1 Vern. 266.

(*i*) *Musgrave's case*, Cary, 38; *How v. Bromsgrove* (Tenants), 1 Vern. 22; *Cowper v. Clerk*, 3 P. Wms. 155; *Atkins v. Hatton*, 2 Anst. 390; see also *Toth. 111*, citing *Sterling v. Burton* (Tenants). (*k*) 2 Atk. 516.

(*l*) *Wood v. Abrey*, 3 Madd. 424.

(*m*) *Christian v. Corren*, 1 P. Wms. 350; see also *Ashe v. Royale*, 1 Vern. 367; *Smith v. St. Paul's* (Dean, &c.), Show. P. C. 67.

(*n*) *Clench v. Witherly*, Finch, 376.

(*o*) *Rogers v. Marshall*, 17 Ves. 294.

(*p*) *Fielding v. Winwood*, 16 Ves. 90; see also *Biscoc v. Cartwright*, Gilb. 121; *Chapman v. Gibson*, 3 B. C. C. 229; *Hills v. Downton*, 5 Ves. 557.

(*q*) *Rogers v. Marshall*, 17 Ves. 294.

(*r*) *Brodie v. Barry*, 2 V. & B. 130.

I. Customary Freeholds.

§ 920. Properties of a Customary Freehold.

921. Such Copyholders have what Kind of Freehold.

§ 922. How Lands of this Tenure pass.

923. Mode of pleading Customary Freehold.

§ 920. "In some manors," it is said, "the tenants have the lands granted to them and their heirs in fee, fee-tail, or for life or years, according to the custom of the manor, and *not at the will of the lord, according to [*710] the custom in which case the rolls and copies ought to be made,(s) and these are what my Lord Coke calls 'copyholds of frank tenure,' "(t) by which name they were distinguished from common copyholds, and, in reality, were distinguished by this property, that they were not tenants at will of the lord. Such customary freeholds still retain several of the badges of their original base tenure. Thus it was, that though their services were certain, and so far free, yet they were villein services, and not free services. So, their mode of alienating or transferring their land was, not by the usual conveyances by deed at common law, but by surrender into the hands of the lord; and so, in like manner, they could not either sue or be sued in the queen's court, but only in the court-baron of the lord. So, although the lands were not held at the will of the lord, and therefore the tenant could not ever have been ousted at the lord's pleasure, yet still the lands were liable to forfeiture, and the tenant might be ousted by his own default, for the non-payment or non-performance of the rents and services, which no free tenant could be by the common law. So, likewise, as a further mark of distinction by which these tenants may be known as copyholders, and not freeholders, they were not members of the county court, where all elections by freeholders are directed to be made, and were not contributory to the wages of the knights of the shire, which were formerly raised by their constituents to defray their expenses in Parliament;(u) consequently, before the 2 & 3 W. 4, c. 45, they had no vote for the election of members of Parliament.

921. But although these tenants have to some purposes a freehold, yet this is not so much a freehold of tenure as a freehold of estate; and the better opinion is, that the freehold of such copyhold lands is in the lord, and not in the tenant, even although they pass, as is frequently the case *by [*711] deed of grant, or bargain and sale and admittance, instead of surrender and admittance;(x) but a distinction has been taken between cus-

(s) West. Symb., s. 605. (t) Co. Cop., s. 32. (u) Blackst. Law Tracts, 132 et seq.

(x) Stephenson v. Hill, 3 Burr. 1273; Reay v. Huntington, 4 East, 271; Doe v. D'Anvers, 7 East, 299; see also Moor, 588, pl. 796; Gale v. Noble, Carth. 432; Crowther v. Oldfield, 1 Salk. 364; S. C., 1 Lutw. 125; 2 Ld. Raym. 1225; Glover v. Cope, 1 Show. 284; Hussey v. Grills, Amb. 301; Fenn v. Mariott, Willes, 430; Oliver v. Taylor, 1 Atk. 474; Somerset (Duke) v. France, 1 Stra. 654; Vaughan v. Atkins, 5 Burr. 2766; Burrell v. Dodd, 3 B. & P. 378; Roe v. Vernon, 5 East, 51; Rae v. Briggs, 16 East, 406; Doe v. Jackson, 1 B. & C. 448; S. C., 2 D. & R. 514; sed contra, Bingham v. Woodgate, 1 Russ. & M. 32; S. C. nom. Huddestone v. Corbett, 1 Tam. 183.

¶ Eng. Com. Law Reps. viii. 126.

tomary estates held of the manor, in which case the freehold is in the tenant, or whether it be within and parcel of the manor, where the freehold is in the lord.(y)

922. In *Hussey v. Grills*(z) it was held, that, where there is no custom to surrender to the use of a will, a customary freehold can only pass by a will attested, by the Statute of Frauds, or now according to the 7 W. 4 & 1 V. c. 26, see Dig. P. iii. tit. Wills. And so, in *Willan v. Lancaster*,(a) held, that the equitable interest of a customary freehold would not pass by a will not executed according to that statute, although common copyholds were held not to be within that statute; and it has been held, that a customary freehold, whether strictly copyhold or not to all purposes, would pass under the description of "copyhold" in a will, the intention to pass it under that description being apparent.(b) So, it has been holden that customary or tenant-right estates, held of the lord by certain rents and services, according to the custom of the manor, were not within the Statutes of Partition, see Dig. P. iii. tit. Partition; and consequently, where it appeared upon the face of the plea that the land was not properly freehold, the plaintiff was nonsuited.(c) So, as customary freeholds are regulated by custom in the same manner as common *copyholds, held, that a custom in a manor, that the grantee of a customary estate, which will pass [*712] either by surrender or deed and admittance, must be admitted during the life of grantor, is good.(d)

923. In one respect, namely, as to the mode of pleading, there is a difference between common copyholds and customary freeholds, for a copyholder must not omit the words *ad voluntatem domini*;(e) and where these words are omitted, it will be intended to be customary freehold.(e) See also *Gale v. Noble*,(f) *Hill v. Bolton*,(g) *Follett v. Troake*;(h) in which latter case it was held that a customary freeholder may prescribe in a *que estate*, which a common copyholder cannot do. Where, in a "manor, the copies of admissions were anciently to hold of the lord, according to the custom of husbandry of the said manor," but other copies were to hold "at the will of the lord," and all modern copies were so held, that this land was copyhold, and not customary freehold.(i) See further, as to the distinction between copyholds and customary freeholds, post, under CUSTOMARY ESTATES and TITLE.

(y) Manning's Exch. Pract. 42, 359, 2d ed.

(z) Ambl. 301.

(a) 3 Russ. 108.

(b) Doe v. D'Anvers, 7 East, 299.

(c) Burrell v. Dodd, 3 B. & P. 368.

(d) Fenn v. Mariott, Willes, 430.

(e) Hughs v. Harrys, Cro. Car. 229.

(f) Carth. 432.

(g) 2 Lutw. 1171.

(h) 2 Ld. Raym. 1186.

(i) Bourn v. Rawlins, 3 Smith, 405.

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*II. Ancient Demesnes.

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| <p>§ 924. What is Ancient Demesne.
 What Lands are Ancient Demesne.
 Doomsday Book.</p> <p>925. Different Kinds of Tenants.</p> <p>926. Enumeration of Privileges belonging to this Tenure.
 Not to be impleaded out of the Manor.</p> <p>927. Not to be impanelled on a Jury.</p> <p>928. To be exempt from Tolls.</p> <p>929. To be free of Taxes.</p> <p>930. May have a Writ of <i>monstraverunt</i>.</p> <p>931. May become Frank-fee.
 By Act of the Queen.
 By Act of the Lord.</p> | <p>§ 931. By Act of the Tenant.</p> <p>932. Effect of a Fine or Recovery.</p> <p>933. Court of Ancient Demesne not a Court of Record.</p> <p>934. Constitution of the Court.
 Suitors the Judges.</p> <p>935. Jurisdiction of the Court.
 In Cases of Ouster.</p> <p>936. When and how Ancient Demesne may be pleaded.</p> <p>937. Affidavit, &c., necessary.</p> <p>938. Cases where Ancient Demesne is a good Plea, or otherwise.</p> <p>939. Not in Personal Actions.</p> <p>940. Duty of the Lord.</p> |
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§ 924. This tenure may be considered, as to what relates to its nature; to the privileges enjoyed by tenants in *ancient demesne*; how *ancient demesne* may become frank-free; court of *ancient demesne*. As to incidents of the estate in *ancient demesne*, see post, CUSTOMARY ESTATES.

1. Nature of *Ancient Demesne*.

Tenure in *ancient demesne*, at least the free sort of it, is a higher kind of customary freehold, and it is confined to such lands as were held in socage of manor belonging to the Crown, in the reign of Edward the Confessor and William the Conqueror, and is, therefore, sometimes designated "socage in ancient tenure."^(k) All such lands were set down in a book called Domesday or Doomsday Book; namely, those which were in the possession of Edward the Confessor, under the title of *Terræ Regis Edwardi*, and those in the possession of *William the Conqueror, under that of *Terræ Regis* only; and therefore, whether *ancient demesne* or not is to be tried by that book; but the writ does not require the production of the book itself, only a certificate of the fact from the treasurer and chamberlain of the Exchequer;^(l) and unless the manor is mentioned therein as *Terræ Regis* or *Terræ Regis Edwardi*, it will not be deemed *ancient demesne*, although the book should furnish evidence of a grant thereof from the Crown;^(m) but this book will not show whether the lands themselves are *ancient demesne*, or not, but only whether the manor be so or not;⁽ⁿ⁾ for an acre of

(k) F. N. B. 14, D.; 2 Inst. 512; 4 Inst. 269; Lex Man. 26 et seq.; Hunt v. Burn, 1 Salk. 57; S. C., Holt, 60; S. C., 1 Com. 93.

(l) F. N. B. 16, C.; see also Hob. 188; 1 Brownl. 43; Holdy v. Hodges, 1 Sid. 147; S. C. nom. Holdaye v. Hodges, 1 Lev. 106.

(m) Kitch. 192, 193; Saunders v. Welch, cited 1 Salk. 57.

(n) 2 Burr. 1048.

land may be *ancient demesne*, though the manor of which it is parcel is not so; (o) and if the question be, whether lands be parcel of a manor which is *ancient demesne*, this shall be tried *per pais*. (p)

925. Tenants of these lands under the Crown were not all of the same order or degree. Some of them continued for a long time *pure villeins* dependent on the will of the lord, and those who succeeded them in their tenure differed but in some few points. They could not maintain a writ of right close (since abolished by the 3 & 4 Will. 4, c. 27, s. 36, see Dig. p. iii. tit. Limitations) nor a *monstraverunt*, but were obliged to sue by plaint in the lord's court. Others were as good as enfranchised by the royal favour, and hold their lands freely by the grant of the king, being only bound in respect of their lands to perform the better sort of services, and those determinate and certain, as to plough the king's land for so many days, or to supply his court with a certain quantity of provisions, and *other stated services, which have been changed into pecuniary [*715] rents. The estates of these tenants pass by surrender or deed of grant or bargain and sale. (q)

2. Privileges of the Tenure in Ancient Demesne.

926. Lord Coke(r) enumerates six privileges enjoyed by tenants in *ancient demesne*; namely, first, not to be impleaded out of the manor; secondly, to be exempt from juries; thirdly, to be exempt from tolls, &c.; fourthly, to be free of taxes and talliages by Parliament; fifthly, not to be liable to contribute to the expenses of knights of the shire; sixthly, in case of being distrained, to join in a *monstraverunt*.

In the first place, tenants in *ancient demesne* were not to be impleaded for any of their lands, or compelled to appear in any court out of the manor, but to have justice administered to them at their own doors, in a particular court called the *court of ancient demesne*, by a peculiar process denominated a *petit writ of right close*, (now abolished by the 3 & 4 W. 4, c. 27, s. 36, see Dig. p. iii. tit. Limitations,) directed to the bailiff of the queen's manors, or to the lord of the manor, if it be in the hands of a subject. (r)

But it must appear that the land is *ancient demesne*, for if a fine levied in C. P. were still in force, the lands were frank-fee until reversed, and the tenant might, therefore, be impleaded at common law; but affidavit that the lands are reputed *ancient demesne* is sufficient; (s) so, the land must not only be holden of the manor, being *ancient demesne*, but it must appear that the lessor of the plaintiff has a freehold, for lessee of a term cannot sue there; (t) so, if the manor and demesnes of the manor are in dispute, they

(o) 1 Roll. Abr. 321; see also Bro. Ancient Demesne, 15; F. N. B. 14; 11 Co. 6.

(p) Kitch. 192, 193, citing 12 Ass. 18; 22 Ass. 45; Hopkins v. Pace, 1 Show. 271; S. C., Comb. 183; Hunt v. Burn, 1 Salk. 57; S. C., Holt. 60; S. C., 1 Com. 93.

(q) Kitch. 158, 159, 194; F. N. B. 228; Co. Cop., s. 32, tr. 58; 4 Inst. 269.

(r) 4 Inst. 269.

(s) Barnes, 185.

(t) Doe v. Roe, 2 Burr. 1046.

[*716] must *be impleaded at common law, and not in the lord's court, otherwise the lord would be judge in his own cause.(x)

927. So, tenants in *ancient demesne* cannot be impanelled on any jury at Westminster, or elsewhere, in any court, upon any inquest or trial of any cause;(y) and they may have a writ *de non ponendis et juratis*, against the sheriff or any one who has return of writs, and if, after all, the sheriff make a return, they may have an attachment against him;(z) but *ancient demesne* is no exemption from serving the office of constable.(a)

928. So, tenants in *ancient demesne* are exempt from all manner of tolls in fairs and markets for all things concerning husbandry and substance;(b) but this privilege does not extend to him who is a merchant, and gets his living by buying and selling, but it is annexed to the person in respect of the land, and to those things which grow and are the produce of the lands;(c) and this privilege extends as well to tenants who hold of a subject as of the queen;(d) and so it extends to tenants in *ancient demesne*, whether they hold in fee, for life, or years, or at will;(e) so, to the lord himself.(f)

929. Again, tenants in *ancient demesne* are to be free of taxes and *tailiages* by Parliaments, unless they be specially *named,(g) and [*717] regularly, all general acts of Parliament extend to *ancient demesne* lands.(h) So, they were not to contribute to the expenses of knights of Parliament;(h) but before the 2 & 3 W. 4, c. 45, they, in common with ordinary copyholders, did not enjoy the elective franchise.(i)

930. Lastly, if tenants in *ancient demesne* be severally distrained for other services, than they are obliged to by the custom of the manor, they may have a writ of *monstraverunt* directed to the lord, commanding him not to distrain for other services; and if he will distrain, &c., then by a writ directed to the sheriff he may command him, not to demand or distrain for other services; and if he still persists, then he may raise the *posse comitatus*, or command the neighbourhood to rescue and destroy the distress, but the usual course is, that if after the writ to the sheriff the lord will distrain, then attachment lies against him, returnable in one of the courts at Westminster, to answer the contempt;(k) so they all, for the saving of charges, may join in this writ, albeit, they be several tenants;(l) so, this writ may be sued

(x) 1 Salk. 56.

(y) F. N. B. 14, F.; Bro. Aunc. Demn., pl. 42.

(z) 1 Co. 105.

(a) R. v. Bettsworth, 2 Show. 75; S. P., if not S. C., 1 Vent. 344.

(b) Kitch. 194; 4 Inst. 269; S. P., Cox v. Barnsley, 110b. 48; Roll. Abr. 321.

(c) F. N. B. 228, D.; Ward and Knight's case, 1 Leon. 232; S. C. nom. Ward v. Knight, Cro. El. 227; 2 Inst. 221; 1 Roll. Abr. 321.

(d) Case of the Town of Leicester Toll, 2 Leon. 191.

(e) Bro. Aunc. Demesnes, pl. 43; Case of the Town of Leicester Toll, 2 Leon. 191; 1 Roll. Abr. 322; Savery v. Smith, 2 Lutw. 1146.

(f) 1 Roll. Abr. 322, citing 9 H. 6, 25 b.

(g) 4 Inst. 263.

(h) Id. 270.

(i) Blackst. Tr. 132 et seq.

(k) F. N. B. 15; and see Bac. Abr., tit. Ancient Demesne, (B.).

(l) 4 Inst. 269.

generally, without showing the names of the tenants ;(*m*) but in an attachment against the lord, the tenants suing it must be named, and those only who are specially named in the writ of attachment shall recover special damages.(*n*)

If frank-tenants, and those by base tenure, join in a *monstraverunt*, the writ shall abate only as to the latter ; so, the lord shall not be put to answer until the Court be certified by the treasurer and chamberlain of the Exchequer, that the manor is *ancient demesne*.(*o*)

*3. *How Ancient Demesne may become Frank-fee.* [*718]

931. Lands in *ancient demesne* may become frank-fee either by act of the queen, act of the tenant, or by act of the lord.

If land which is *ancient demesne* comes to the queen, it becomes frank-fee ;(*p*) and so it remains, although the queen grants it in fee or for life, with or without rent reserved ;(*q*) but if it be re-granted by the queen, to be held of the manor again, it becomes restored to *ancient demesne* ;(*r*) so, if the queen seised the land, and after patent repealed grant it to another ;(*s*) so, if tenant in *ancient demesne* enfeoff his lord, the land becomes frank-fee ; so, if the tenancy escheat to him,(*t*) or the lord disseise the tenant ; so, if the lord grants the services of the tenant to another, and the tenant attorns ;(*t*) but if the lord release his tenant from the services for a certain time, after the time expired the land is *ancient demesne* again.(*u*)

932. So, before the abolition of fines and recoveries by the 3 & 4 W. 4, c. 74, (see Dig. P. ii. tit. Fines and Recoveries,) if a fine were levied, or a recovery suffered, of lands in *ancient demesne*, this made them frank-fee ;(*x*) but if the lord were not a party, he might have a writ of deceit, which writ, however, is abolished by the 3 & 4 W. 4, c. 27. (See Dig. P. iii. tit. Limitations.) So, a termor might also have this writ.(*y*) So, an action on the case, in the nature of deceit, would have lain ;(*z*) but he could not have a *scire facias*.(*a*) If, however, the lord were a party, then the lands become frank-fee.(*b*)

*4. *Court of Ancient Demesne.* [*719]

933. The court of *ancient demense* is a court-baron, and not a court of record ; in respect to which it is necessary to consider the constitution of the court ; the jurisdiction of the court and proceedings therein ; how the lord shall be compelled to do right ; and when and how the plea shall be removed.

(*m*) Plowd. 129 ; F. N. B. 15, D, F.

(*p*) Id. 16, C.

(*q*) F. N. B. 13, C. ; 1 Roll. Abr. 324.

(*s*) 1 Roll. Abr. 325.

(*u*) 1 Roll. Abr. 325.

(*x*) 7 H. 4. 44, cited 1 Roll. Abr. 327 ; 10 Co. 50 ; 4 Inst. 270.

(*y*) 1 Roll. Abr. 327.

(*a*) 3 Lev. 419.

(*n*) F. N. B. 16, B.

(*p*) 1 Roll. Abr. 324.

(*r*) Kitch. 194.

(*t*) 4 Inst. 270.

(*z*) R. v. Hadlow, 2 Bl. 1170.

(*b*) 1 Roll. Abr. 324 ; 1 Finch, Law, 15.

a. *Constitution of the Court.*

934. Though the writ of right close, before its abolition, (see ante, § 926) were directed to the lord or bailiffs, yet the suitors are the judges ;(c) therefore, pleading a suit there *coram A. et B. ballavis, et C. et D. sectatoribus*, is bad,(d) but *coram A. et B. ballivis et sectatoribus* is well, because they shall be intended to be bailiffs and suitors also.(d) So, *coram senechal-lo, sectatoribus, et domesmen* ;(e) so, the suitors there may act by attorney, although they are the judges.(f)

b. *Jurisdiction of the Court.*

935. A court of *ancient demesne* held plea by writ of right close, in all cases where a tenant in tail for life, or in dower of tenements in *ancient demesne*, was ousted and disseised; and the party ousted, or his heir, might have such writ ;(g) and after the delivery of the writ, the demandant should make protestation to sue in form of an assize of *mort d'ancestor*, &c., all which writs are now abolished. (See ante, § 926.) So, the tenant might also have a bill of fresh force in this court, within forty days after disseisin, without any writ sued ;(h) so, he might have an ejectment,(i) which is now *the only real action for trying titles, since [*720] the abolition of real actions before mentioned. So, if the lord himself ousted his tenant, it was said that the tenant might have had the writ of right close, or an action at common law, at his election ;(k) but see *Baker v. Wich*,(l) where it was held, that the manor, and the demesnes of the manor, are impleadable at common law, and not in the lord's court ; for then the lord would be judge in his own cause. On the other side, *ancient demesne* lands held of the manor are impleadable in the court of *ancient demesne*, and there only ;(l) but it must appear that the lands are *ancient demesne*, for where a fine had been levied of lands in *ancient demesne*, the land was frank-fee until the fine was reversed, and the tenant might, therefore, be impleaded at common law, for the privilege of *ancient demesne* being established solely for the benefit of lord and tenant, it has been held that they may destroy it at pleasure.(m)

936. If tenants in *ancient demesne* are impleaded elsewhere than in the court of *ancient demesne*, they may plead their tenure in abatement ; and *ancient demesne* was held to be a good plea in all cases where a recovery could make his land frank-fee, and might, therefore, be pleaded in ssizes, and other real actions, before their abolition.(n) See ante, § 926. So, it is a good plea wherever the interest of the land is bound, or the realty may

(c) Gentleman's case, 6 Co. 11 ; S. P., *Abrahall and Nurse's case*, 3 Leon. 63.

(d) *Lutw.* 713.

(e) *Id.* 773.

(f) 1 Salk. 341.

(g) F. N. B. 11, F.

(h) *Kitch.* 188, 189 ; F. N. B. 13, E. ; Bro. Aunc. Dem., pl. 1, citing 26 H. 8. 4.

(i) *Gybon v. Bowyer*, Moor, 451.

(k) F. N. B. 12, E.

(l) 1 Salk. 56.

(m) *Finch, Law*, 15 ; 1 Roll. Abr. 324 ; 1 Salk. 57.

(n) 4 Inst. 270 ; 1 Roll. Abr. 322, citing 8 H. 6. 1.

come in question ;(o) it might, therefore, and still may, be pleaded in ejectment ;(p) but it must, in this case, be pleaded within the first four days of the term, this being a dilatory plea ;(q) and it was in one case denied, because it was after the four days, being *a plea to the jurisdiction ;(r) and, for other similar cases, see *Marshall v. Allen*,(s) [*721] *Roberts v. Foster*,(t) *Wroot v. Fenor*.(u)

937. So, the plea must be with leave of the Court, and on affidavit ;(v) and the affidavit must state that the lands in question are held of the manor, which is *ancient demesne*, for then only are they pleadable, *Hatch v. Cannon* ;(x) and it was there said, that an affidavit is necessary wherever you plead to the jurisdiction of the Court, and, for anything that appears, the lands may be parcel of the manor which is *ancient demesne*, and such lands are pleadable at common law ;(y) for the jurisdiction of the lord's court in *ancient demesne* extends only to lands holden of the manor, and not to copyhold, which is parcel of the manor.(z) So, the affidavit must state, not only that the lands are holden in *ancient demesne* and holden of the manor, but also that the manor is holden in *ancient demesne*, and that there are suitors in the court ;(a) so, likewise, that the lessor of the plaintiff has a freehold interest ; for the lessee of a term cannot sue there,(u) but the plea may be filed *de bene esse*, where the four days would have expired before cause could be shewn and the plea pleaded.(b)

So, it has been held, that the plea of *ancient demesne* is good, without defence, *North v. Hoyle*,(c) *Smith v. Frampton*,(d) *Farrers v. Miller* ;(e) but see *S. C. nom. Ferrer v. Miller*,(f) and *S. C. nom. Ferrers v. Miller*,(g) where *Holt, C. J., against three judges, held that the plaintiff was not obliged to take the plea without the defence. [*722]

938. In replevin *ancient demesne* is a good plea, because by intendment the freehold may come in question ;(h) so, in account against guardian in socage, or bailiff of a manor ;(i) so, in a writ of admeasurement of pasture ;(k) so, in a writ of partition before its abolition (see ante, § 926),(l) the land being collaterally, though not directly in question.

(o) Alden's case, 5 Co. 105 ; S. C., nom. *Smith v. Arden*, Cro. El. 826 ; 2 Andr. 178 ; S. P., Cox v. Barnsley, Hob. 47.

(p) *Gybon v. Bowyer*, Moor, 451.

(q) *Smith v. Roe*, Barnes, 331.

(r) *Pease v. Badtittle*, 336.

(s) *Latch*, 83 ; S. C., Cro. Car. 9 ; S. Palm. 406.

(t) Barnes,

(u) 8 T. R. 474.

(v) *Rust v. Roe*, 2 Barr. 1046 ; see also *Smith v. Roe*, Barnes, 331 ; *Hatch v. Cannon*, 3 Wils. 51, overruling *Goodright v. Shuffill*, 2 Ld. Raym. 1418.

(x) 3 Wils. 51.

(y) *Hatch v. Cannon*, sup.

(z) *Brittle v. Dade*, 1 Salk. 185 ; S. C. nom. *Brittel v. Bade*, 1 Ld. Raym. 43.

(a) *Rust v. Roe*, sup.

(b) *Morton v. Roe*, 10 East, 523.

(c) 3 Lev. 182.

(d) Id. 405.

(e) 1 Show. 386.

(f) 1 Salk. 217.

(g) Carth. 220.

(h) Bro. Aune. Dem., pl. 4, citing 40 E. 3 ; F. N. B. 11, I. ; Alden's case, 5 Co. 105, d ; Cox v. Barnsley, Hob. 47 ; Owen's case, Ow. 24 ; Godb. 64, ca. 76.

(i) 4 Inst. 270.

(k) Bro. Aune. Dem., pl. 20. 37, citing 8 H. 6, 34 ; 1 Roll. Abr. 322.

(l) *Grace v. Grace*, 1 Roll. Abr. 322 ; *Pont v. Pont*, T. Raym. 249.

939. *Ancient demesne* is not a good plea in actions merely personal, as debt upon a lease, trespass *quare clausum fregit*, &c.; so, in trespass *contra pacem*, though the realty come in debate, yet *ancient demesne* is no plea, for this is at the suit of the queen, and for the good of the commonwealth;(m) so, in a *quare impedit ancient demesne* is no plea, for if it should be granted, it would be a failure of right, for in the court of *ancient demesne* they cannot grant a writ to the bishop;(n) so, in a writ of waste before its abolition, (see ante, § 926,) *ancient demesne* was no plea, because in *ancient demesne* they could, upon the return of the distress, not award a writ to inquire of waste, according to the statute, for the sheriff ought by the statute to go in person, which could not be supplied by their officer, and so there would be a failure of right.(o)

c. *How the Lord shall be compellable to do right.*

[*723] 940. If the lord will not hold his court, the tenant in **ancient demesne* may have a writ out of Chancery, commanding him to hold it, and to proceed according to law;(p) and if then he will not hold it, he may have an attachment returnable in Q. B. or C. P., and shall recover his damages;(p) so, he may have a writ to the lord, commanding him to do right, and upon that an *alias pluries* and attachment,(p) or a writ to the sheriff, commanding him to take four knights, and to go to the lord's court, and see that right be done;(p) so, there may be a writ to the suitors to proceed to execution upon the judgment there;(q) and they cannot in that case return that it is frank-fee, for the jurisdiction is admitted by the appearance, and the plea of the defendant there;(q) and if it be frank-fee, the suitors are not trespassers, where upon a writ to them they award execution;(q) otherwise, if the land be frank-fee, and they award execution without such writ.(q)

4. *How the Plea shall be removed.*

941. The demandant in *ancient demesne* cannot remove the plea out of the court there for any cause;(r) but the tenant may remove it for any of the causes which make it frank-fee, (see ante, § 931),(r) but he ought to prove it to be frank-fee when it is removed, otherwise it shall be remanded;(s) so, he may remove the plea if there be no other but one suitor, for that the suitors are judges, and therefore the demandant must sue at common law, otherwise there would be a failure of justice;(t) so, for default of trial there, as if the defendant pleads a foreign plea, a *super-*

(m) *Smith v. Arden*, Cro. El. 826; *Cox v. Barnsley*, Hob. 47; 1 Roll. Abr. 322.

(n) *Cox v. Barnsley*, Hob. 48; 1 Roll. Abr. 322.

(o) 2 Inst. 306; 4 Inst. 270; *Cox v. Barnsley*, Hob. 47.

(p) F. N. B. 12, D.

(q) Moor, 451.

(r) F. N. B. 13, B.; 4 Inst. 269.

(s) F. N. B. 13, C.

(t) 4 Inst. 470; sed quære, F. N. B. 13, C.

scedeas goes to the lord of an *ancient demesne* to surcease ;(*u*) so, if he plead bastardy, for the court there cannot write to the bishop.(*x*)

*If the lord in *ancient demesne* proceed after the plea removed by *recordari*, a *certiorari* goes to C. P., to certify the tenor of the [^{*}724] record removed into the Chancery, and upon that an attachment lies against the lord to answer to the queen and the party in C. P. ;(*y*) so, if the lord proceed after a *supersedeas*.(*z*)

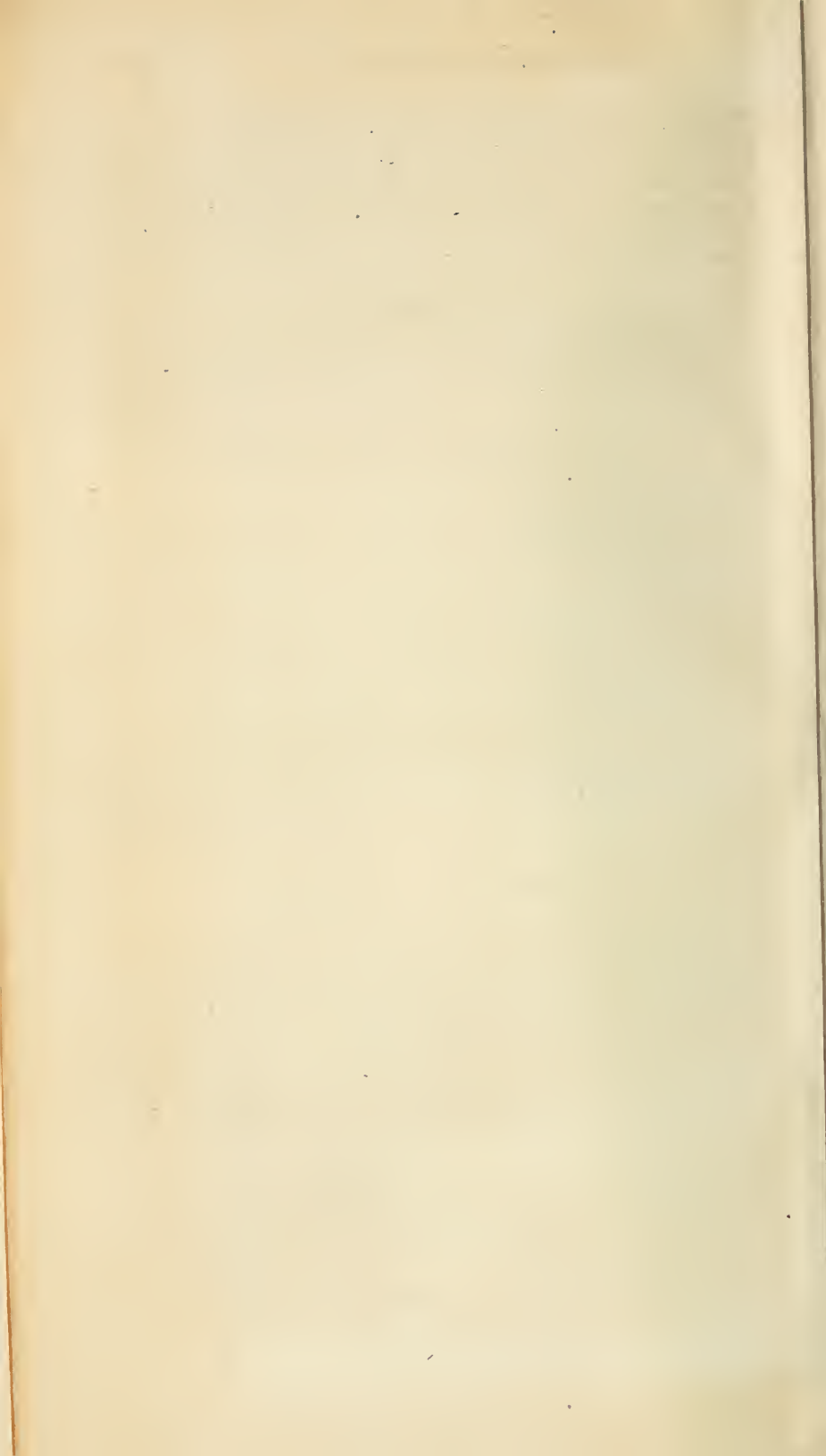
(*u*) F. N. B. 13, C.

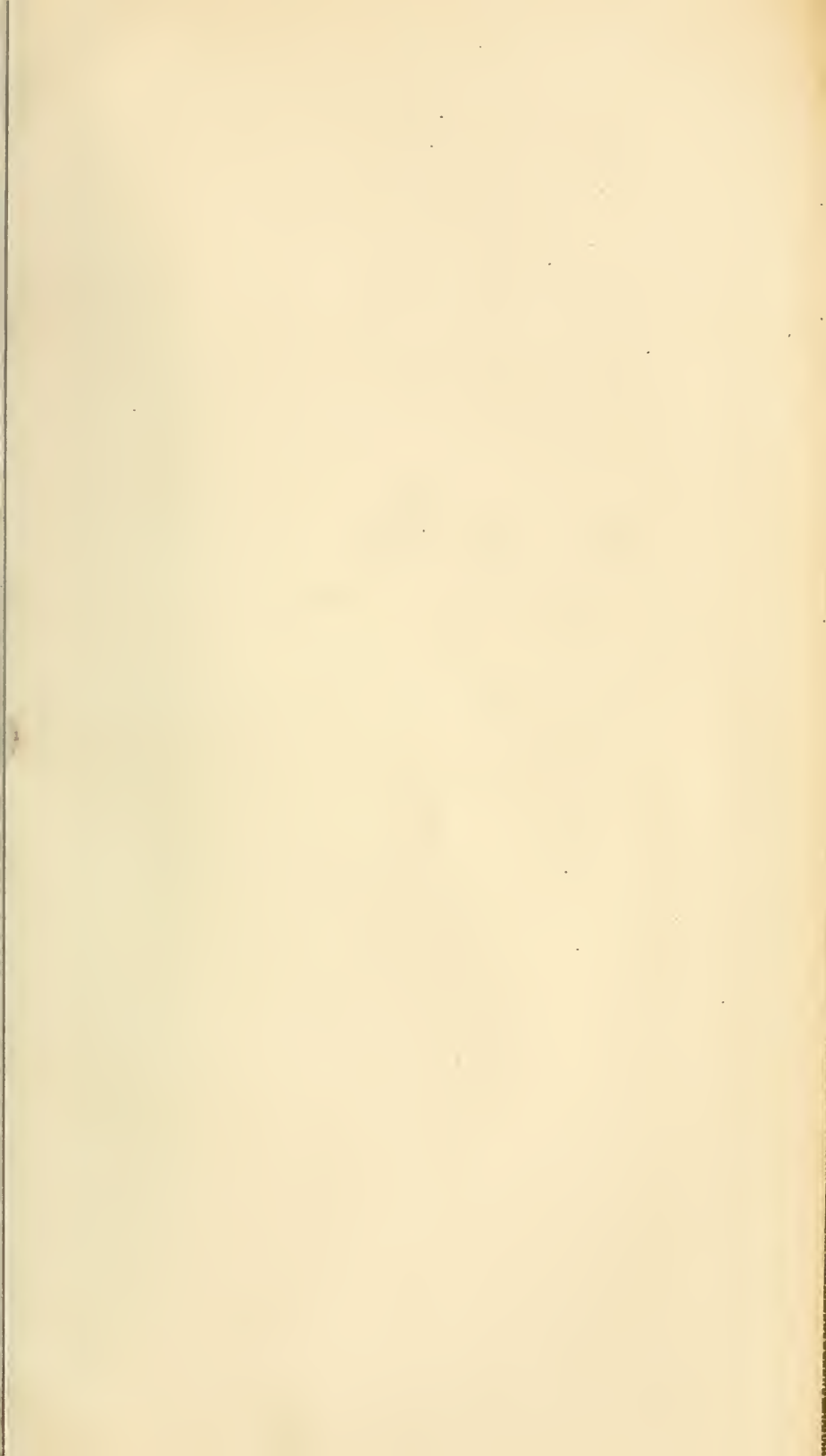
(*y*) F. N. B. 13, H.

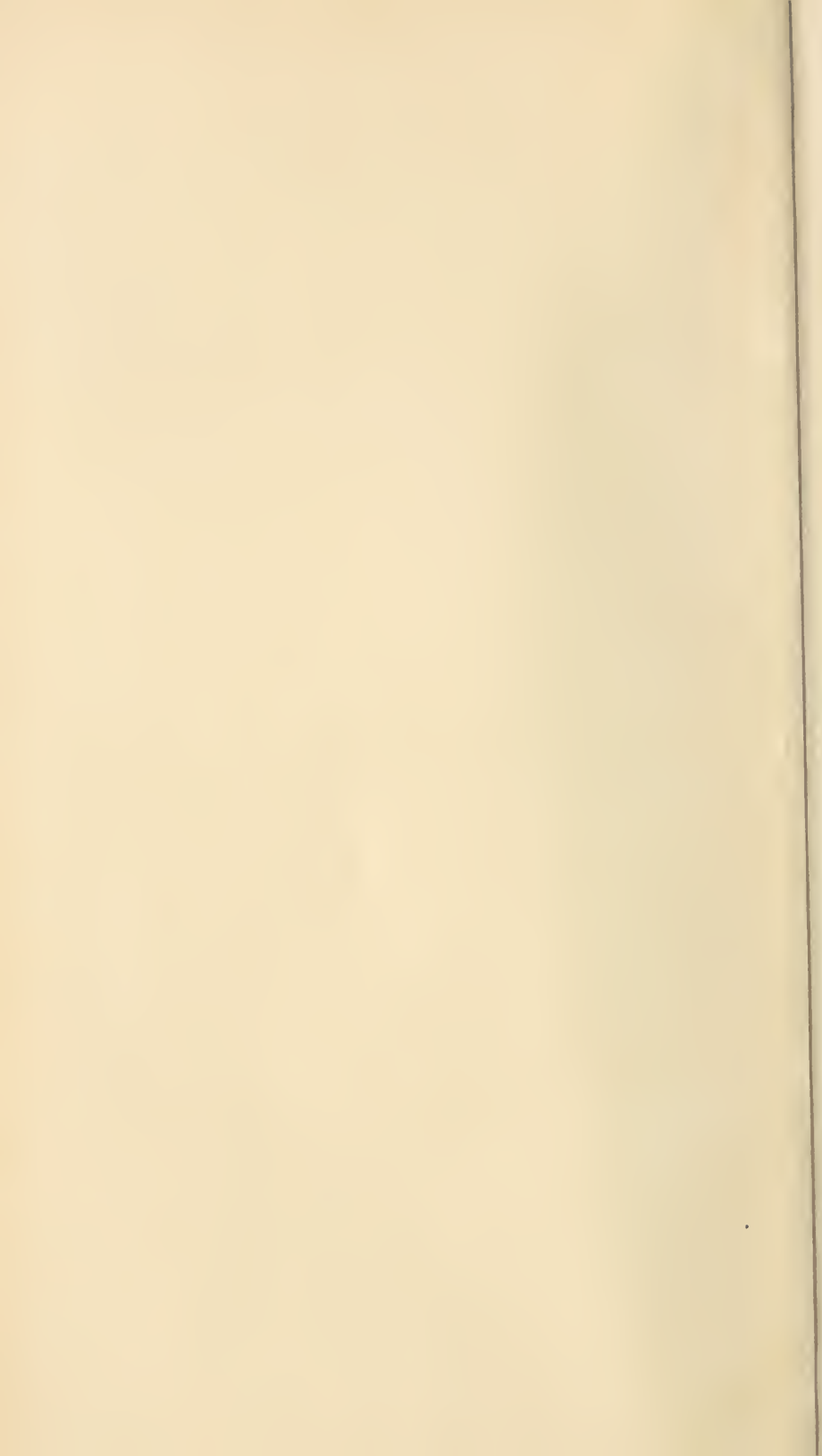
(*x*) Reg. 9, a.

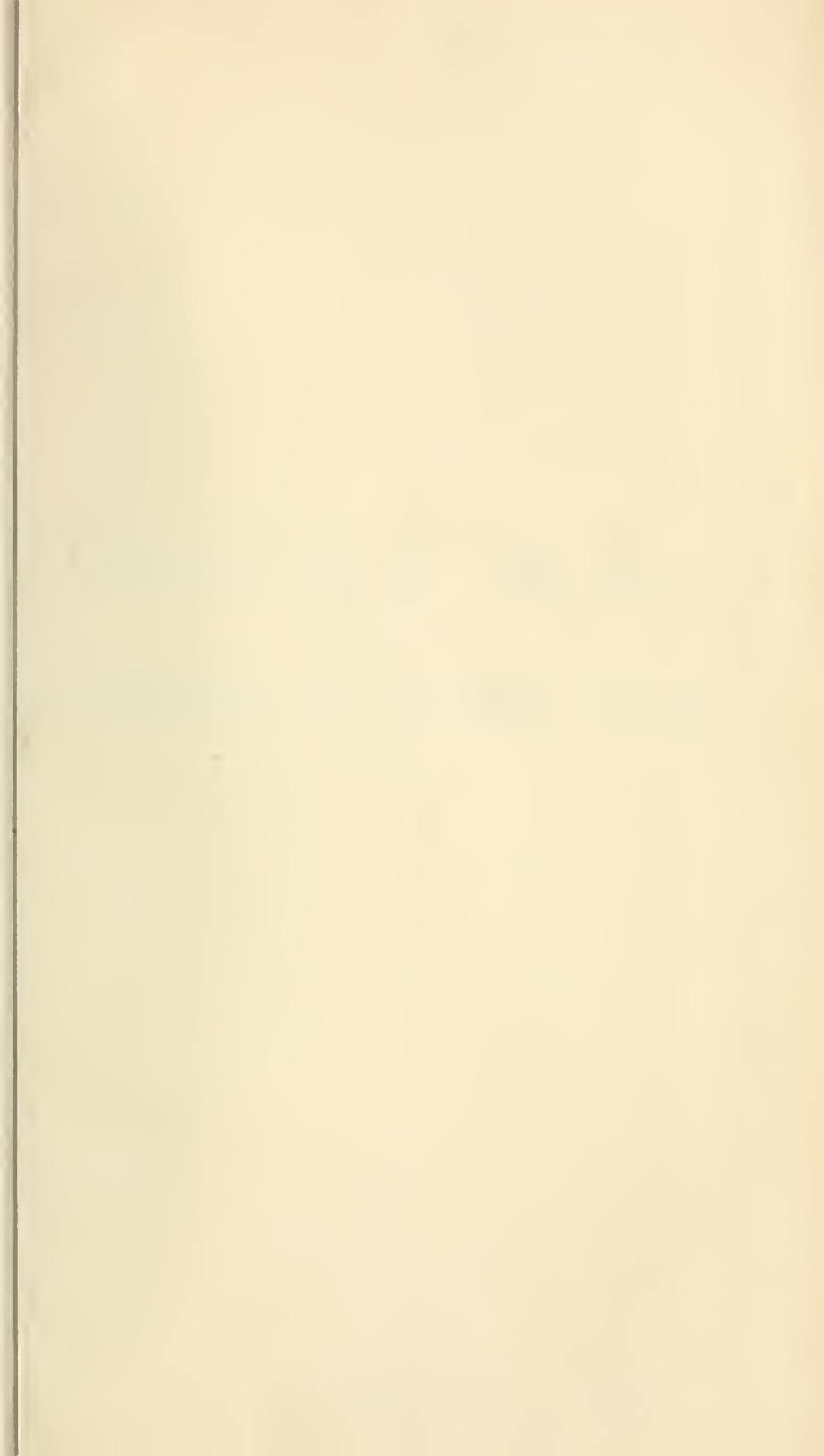
(*z*) Id. 14, A.

END OF VOL. I.









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